TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924.

No. [redacted]26

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD, OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED FEBRUARY 26, 1925.

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OCTOBER TERM, 1923.

No. 228.

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3 UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss.

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America the one hundred and forty-seventh, to wit: on Monday, the 20th day of November, A. D. 1922.

Present: Honorable Maurice H. Donahue, Circuit Judge, John M. Killits, District Judge, D. C. Westenhaver, District Judge, United States judges.

THE VILLAGE OF HUBBARD, OHIO, vs. UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, and The Pennsylvania-Ohio Power & Light Company.	No. 680. In equity.

Said action was commenced on the 12th day of December, A. D. 1921, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

4 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Bill in equity.

(Filed Dec. 12, 1921.)

First. Now comes the plaintiff, the Village of Hubbard, and says that it now is, and at all of the times hereinafter complained of, was a municipal corporation, organized and existing as such and known as a village under the laws of the State of Ohio, and located in Trumbull County, Ohio, and in the Northern District of Ohio, Eastern Division.

That the defendant, The Pennsylvania-Ohio Power & Light Company, is a corporation of the State of Ohio, with offices at No. 25–31 East Boardman Street in the city of Youngstown, Mahoning County, Ohio, which office is located in the Northern District of

Ohio, Eastern Division, and owns and operates an electric street railway, known as Youngstown & Sharon division, which runs between the city of Youngstown, Mahoning County, Ohio, into and thru the village of Hubbard, Trumbull County, Ohio, and thence to the Ohio-Pennsylvania State line in Brookfield Township, Trumbull County, Ohio, which is near the city of Sharon, Pennsylvania, and embraces a distance of about twelve (12) miles.

5 Second. This bill of complaint is brought by the village of Hubbard, Ohio, to restrain the said defendants from further engaging in the collection of rates of fare charged to the citizens and passengers of the village of Hubbard, Ohio, which fares are in excess of those set forth in a certain contract or franchise ordinance, duly passed by the said village of Hubbard, September 12th, 1901, and to set aside, annul, and suspend in whole, an order of the Interstate Commerce Commission, made on November 7th, 1921, increasing the rate of fare, in violation of said contract or franchise ordinance, in Docket No. 12123 of said commission, and thereby invoking the relief provided for in sections 207, 208, 209, 210, and 211 of the Judicial Code of the United States.

Third. That on or about the 12th day of September, in the year 1901, the said plaintiff, the village of Hubbard, as it lawfully might do, entered into a contract, in writing, with the Youngstown & Sharon Street Railway Company, in the form of a street railway franchise ordinance, which was to endure from said date until the first day of January, 1925, a true copy of which said contract or franchise ordinance is hereto attached, marked "Exhibit A" and made a part hereof, as if herein fully rewritten; by the terms and conditions of which the said village of Hubbard granted to said the Youngstown & Sharon Street Railway Company the right to build and construct a line of street railway in and thru said village of Hubbard, along and over certain streets and highways in said village, and over certain private right of way within said village, upon certain terms and conditions particularly set forth in said franchise ordinance, which said contract or franchise ordinance fixed the rates of fare said company might charge, and prescribed conditions upon which the rights, privileges, and franchises therein described were granted to said the Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns.

6 That since the time of entering into said contract or franchise ordinance the rights of the Youngstown & Sharon Street Railway Company arising therefrom were transferred to the Mahoning & Shenango Railway & Light Company, and later to the Pennsylvania-Ohio Electric Company, and at a still later date to the Pennsylvania-Ohio Power & Light Company, defendant herein, which said defendant company assumed the obligations of the Youngstown & Sharon Street Railway Company arising from said contract or franchise ordinance, hereinbefore referred to, and which owns and operates said street railway division, as aforesaid.

Fourth. Plaintiff further says that said contract or franchise ordinance provides for, in sections 10, 11, and 12 of said contract or franchise ordinance, and fixes the rates of fare that said street railway company might lawfully collect for the transportation of passengers upon said line, and that said the Youngstown & Sharon Street Railway Company duly and lawfully accepted the provisions of said contract or franchise ordinance, and together with its successors in interest, operated thereunder, ever since said 12th day of September, 1901, until the 21st day of March, 1920, in strict compliance with the terms and conditions of said contract or franchise ordinance, and especially with regard to the collection from passengers of the fares provided and fixed by said franchise ordinance.

Fifth. Plaintiff further says that said village of Hubbard, ever since the said 12th day of September, 1901, until the present time, has duly performed all conditions, requirements, and obligations by it to be performed, arising from said contract or franchise ordinance.

Sixth. That on or about the 21st day of February, 1920, said the Mahoning & Shenango Railway & Light Company filed its tariff with the Interstate Commerce Commission, to become effective March 21st, 1920, which tariff increased the rates of fare upon said
7 Youngstown & Sharon division, between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points, greatly in excess of the rates provided and agreed upon in said franchise ordinance, the exact figures of which are well known to this defendant company.

Seventh. That on or about the 28th day of August, 1920, the said the Pennsylvania-Ohio Electric Company filed its tariff with the Interstate Commerce Commission, to become effective on October 1st, 1920, which tariff further increased the rates of fare upon said Youngstown & Sharon division between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points, which tariff is known as I. C. C. No. 4, and provided that the cash fare from Hubbard to Youngstown should be twenty (20) cents, whereas the franchise ordinance aforesaid provided a cash fare of twelve (12) cents, and the cash fare from Hubbard to Sharon was fixed at twenty (20) cents, whereas the franchise ordinance provided for a cash fare of thirteen (13) cents, and other increases were made, too numerous to incorporate in this pleading, but well known to said defendant company and indicated by its said tariff I. C. C. No. 4.

Eighth. Said plaintiff further says that this plaintiff filed its protest to the rates established by the said tariff I. C. C. No. 4, as filed with the Interstate Commerce Commission, on or about the 18th day of September, 1920, and as and for its reasons therefor, set forth that said contract or franchise ordinance was still in force and effect, and that the collection of rates of fare in excess of the provisions of said franchise ordinance would constitute a violation of the constitutional rights of said village, which protest the said Interstate Commerce Commission overruled, and refused to suspend said tariffs.

Ninth. Said plaintiff further says that ever since said 31st day of March, 1920, until the present time said defendant, The Pennsylvania-Ohio Power & Light Company, and its predecessors in interest, have been and now are collecting said rates of fare provided in said tariffs that are in excess of the rates fixed and provided in said contract or franchise ordinance between the village of Hubbard and the city of Sharon, Pennsylvania, and intermediate points.

Tenth. Plaintiff further says that the said defendant, The Pennsylvania-Ohio Power & Light Company, in December, 1920, filed with the Interstate Commerce Commission a petition in a cause known and numbered upon the docket of said commission as Number 12123, wherein said petitioner set forth the ordinance herein referred to, the action of the Ohio Utilities Commission, and praying that a hearing may be had on the matter, and that they might be relieved from the rates prescribed in said franchise for the reason that said rates were discriminatory and unduly preferential, and said Interstate Commerce Commission, on the 21st day of January, 1921, in compliance with said petition, ordered an investigation into said matter and notified this plaintiff and others that an investigation was about to be made into said matters, to which petition and order this plaintiff filed a separate pleading before said Interstate Commerce Commission, demurring to said petition on the ground that the said Interstate Commerce Commission had no jurisdiction to hear or determine the matter set forth in said applicant's petition, and had no authority or jurisdiction to grant relief therein sought, and that the statements contained in said petition did not set forth sufficient facts to invoke the proper jurisdiction of the commission, or to authorize the granting of the relief therein attempting to be sought or any relief whatsoever, and by way of answer set forth that said matters were res adjudicata on account of the holding of the utilities commission of the State of Ohio, made and decided in said matters on the 29th day of September, 1920, and further setting forth the rights of said village by virtue of said franchise ordinance and other defenses, as in said answer more particularly set forth, a copy of which demurrer and answer was thereupon filed with the defendant company herein.

Plaintiff further says that a hearing on said matter was had before said commission on the 5th day of May, 1921, and that on the 7th day of November, 1921, said Interstate Commerce Commission decided said matter adversely to this plaintiff, and sustained the allegations of the petition of said The Pennsylvania-Ohio Power & Light Company therein filed, and entered thereunder the following order:

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12123.

Ohio rates, fares, and charges.

In the matter of rates, fares, and charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintained passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides, when a commutation ticket for this transportation is purchased.

It is further ordered that this order shall take effect on or before January 4, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

GEORGE B. MCGINTY,
Secretary.

Eleventh. Plaintiff respectfully shows to the court that the
10 said order of the Interstate Commerce Commission of November 7th, 1921, is void for the following reasons:

(*a*) Because said Interstate Commerce Commission, in said order, attempted to fix the fare of intrastate business, which order is contrary to the authority granted said commission by Congress, and therefore has no jurisdiction of the subject matter herein contained.

(*b*) Because the said order, increasing said rate of fare, will deprive this plaintiff of its property without due process of law, take

its property without compensation, and deny to it equal protection of the law, as guaranteed to it by the provisions of the constitution of the State of Ohio, article 1, section 19, and of the Constitution of the United States of America, 5th amendment.

(*c*) Because the enforcement of said order will impair the obligations of a valid and subsisting contract existing between this plaintiff and The Pennsylvania-Ohio Power & Light Company, without the consent of the said plaintiff herein.

(Amendment by leave of court, Dec. 29/21:)

(*d*) Because The Pennsylvania-Ohio Power & Light is not a common carrier and is not an interurban electric railway operated as a part of a general steam railway system of transportation, nor is it engaged in the general transportation of freight; that said defendant, the Interstate Commerce Commission, was without jurisdiction under the Constitution and laws of the United States to hear or determine the said controversy or to make any order therein.

Twelfth. Plaintiff further says that by reason and virtue of all of the facts and acts of said Interstate Commerce Commission this plaintiff has been injured in its property rights and has no adequate remedy at law in the premises hereinbefore set forth and will suffer irreparable injury unless accorded the injunctive relief as herein prayed for.

Wherefore, inasmuch as plaintiff has no remedy in the premises by the strict rules of the common law, and can only obtain relief in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff therefore prays that the aforesaid order of said Interstate Commerce Commission, made in said cause No. 12123, on November 7th, 1921, be wholly set aside and annulled, and that the defendant, The Pennsylvania-Ohio Power & Light Company, be temporarily enjoined from collecting or attempting to collect any fares in excess of the rates provided in said franchise contract and from filing with the said defendant, the Interstate Commerce Commission, any tariff schedules embodying rates in advance of those prescribed by said franchise ordinance, and that the Interstate Commerce Commission be enjoined from accepting or filing any such schedules from said defendant, The Pennsylvania-Ohio Power & Light Company, that may be in excess of the rates prescribed by said franchise ordinance, and that upon final hearing said temporary injunction may be made permanent, and that complainant be granted such other and further relief as it may be entitled to in the premises.

JOHN J. BOYLE and
MOORE, BARNUM & HAMMOND,
Attorneys for Plaintiff.

[Affidavit of Charles F. White to above paper omitted in printing.]

12 *Exhibit A to bill.*

AN ORDINANCE

Granting the Youngstown & Sharon Street Railway Company the right to depart with its line of track from North Main Street, in the village of Hubbard, and to construct the same on private right of way over the track of the Erie Railroad Company and the Lake Shore & Michigan Southern Railway Company and releasing said company from any obligation to construct its tracks on a portion of North Main Street and established the curve of its track at the corner of Main and Liberty Streets, and fixing the rate of fare said company may charge and prescribing conditions upon which the rights, privileges, and franchises herein described are granted.

Whereas the council of the village of Hubbard did, by an ordinance entitled "An ordinance granting the Youngstown & Sharon Street Railway Company the right to construct and operate a street railway in the village of Hubbard," passed the 19th day of March, 1900, grant to said The Youngstown & Sharon Street Railway Company the right to construct and operate a street railway on certain streets in said ordinance mentioned, among others North Main Street in said village; and

Whereas said street railway company has proceeded under said ordinance with the construction of its said line of railway along and upon Liberty Street in said village and along and upon a portion of Main Street in said village; and

Whereas differences have arisen between the village of Hubbard and the said The Youngstown & Sharon Street Railway Company with reference to the kind of curve to be used by said street railway company at the corner of Main and Liberty Streets in said village and the location thereof, and a suit is pending between said company and the said village with reference thereto; and

Whereas the said The Youngstown & Sharon Street Railway Company desires to avoid crossing the tracks of the Erie Railroad Company and the Lake Shore and Michigan Southern Railway Company on North Main Street, and the said street railway company is in control of a certain tract of land abutting on the easterly side of North Main Street in said village at a point about opposite the north line of lot No. 3, in great lot No. 46, in said village, and has acquired a private right of way from that point over the tracks of said railroad company's to a point some distance northerly therefrom, and desires to construct its line of street railway between the said points on said private right of way to the northerly line of the village limits; and

Whereas other differences have arisen between the village authorities and said street railway company with reference to the manner of constructing said street railway in said streets of said village and the restoration of said streets, and its is desired by both parties to adjust all said differences, and said village of Hubbard is

willing to grant the rights, privileges, and franchises herein granted upon consideration of the obligations herein assumed by said The Youngstown & Sharon Street Railway Company, and especially from the rates of fare which it herein agrees to carry passengers over its lines of railway:

Now, therefore, be it ordained by the council of the village
13 of Hubbard, Ohio—

SEC. 1. That the rights, privileges, and franchises herein granted to said The Youngstown & Sharon Street Railway Company are granted upon the conditions that said railway company, its successors, lessees, and assigns shall well and truly observe and perform all the terms and conditions hereof and especially observe and conform to the rates of fare for carrying passengers and the sale of tickets herein prescribed.

SEC. 2. That the said street railway company shall have the right to construct and maintain at the corner of Main and Liberty Streets, in said village, a spiral curve to fit a 45-foot radius, the center of the track to be not more than 19–2 feet from the stone monument at the intersection of the center line of West Liberty Street measuring in the direction of the intersection of the north line of West Liberty Street with the west line of North Main Street, according to the plan and profile on file with the village council. Said curve at said corner shall be paved by said company with brick between the rails and for five feet on the outside of the outer rail and in as far from the inner rail as the corner of the curb and said paving shall be done in such manner as to make said streets at said point suitable, safe, and convenient for public travel. And said railway company shall maintain said paving at said point in manner as aforesaid in a safe and suitable condition for public travel. And shall construct a suitable culvert or drain as will permit the free and unobstructed flow of water around the corner.

SEC. 3. That The Youngstown & Sharon Street Railway Co. be, and the same hereby is, granted the right and privilege to extend its line of street railroad on North Main Street from a point about opposite the north line of lot No. 3 in great lot No. 46 in said village, with a curve having a 60-foot radius, easterly from the center of said street to and upon the private right of way of said company at that point and to connect said track with its track constructed upon said private right of way; that said railway company in constructing said curve may use the curve, rails, and appliances bought by said company for use at the corner of Main and Liberty Streets in said village. Said company shall pave said Main Street the whole length of said curve to the curb line of the street between the rails and for a distance of five feet on each side thereof with brick, so as to render said street safe and convenient for public travel thereover, and shall thereafter so maintain the same, and said curve and said portion of said track connecting the said company track on Main Street with its track upon said private right of way as aforesaid shall be so laid by said company and with such suitable culvert or

drain as will permit the free and unobstructed flow of water down along the east side of said Main Street at said curve.

SEC. 4. That The Youngstown & Sharon Street Railway Company is hereby released and excused from construction and operating that part of its line on North Main Street from the point on North Main Street where it is permitted by section three of this ordinance to turn to and upon its private right of way to the north boundary of said village and is hereby granted the right to operate its said line of railway on and over the private right of way aforesaid in the place of constructing and operating it along and over said portion of said Main Street.

14 SEC. 5. That said single track as well as said double track when laid shall be so laid upon said street as that the top of the rail shall be on a level with the present established grade of said streets, and the rails of said track shall not be laid or maintained, if laid, above the established grade of said streets, except with the consent of the village council of village of Hubbard and consent in writing of the owners of the lots or lands abutting upon the parts of said streets wherein it is desired to lay or maintain rails above the present established grade of said streets and raise the sidewalks on said street or streets at such points to correspond with such elevation of said streets. What the present established grade is shall be determined by council from a profile of said grade in its possession in case there is any uncertainty concerning the same: Provided, however, That where said tracks are now laid above said grade the said company shall have the right to lower the same to conform to said grade: Provided, however, The said street car company shall not use its tracks for the purpose of hauling passengers until said tracks shall be lowered to conform to said grade unless it has obtained said consent in writing of aforesaid from said property owners.

SEC. 6. That said railway company shall within sixty days after said street railroad shall be put in operation in said village place the streets in said village where said tracks are laid in a safe, proper, and convenient condition for public travel, to the full satisfaction of the council, to such width as the council may determine but not beyond the present curb lines; and in so restoring streets to public travel as aforesaid where the tracks and rails of said railroad company are laid above the established grade of said street, if so laid pursuant to the preceeding section, it shall bring said street or streets to a grade corresponding to the level of the top of said rails as the council shall direct with furnace cinder and shall place said street or streets throughout their entire extent where tracks are laid in such condition as will enable persons using them with vehicles to do so and to cross the railway tracks at any point with safety and convenience; and said Railway Co., where its tracks in said streets or either of them are laid above the established grade of the street, shall bring the sidewalks in such portion of said streets to such grade corresponding with the grade of the street after its restoration as

aforesaid, as council shall direct, and in bringing said sidewalks to such grade it shall relay them as the council shall direct, and said street railway company shall pay all the expenses for placing said streets and sidewalks in the manner aforesaid and the grade and condition aforesaid. That in case said street railway company fails to place said streets and sidewalks in the condition aforesaid and bring them to the grade aforesaid within said period of sixty days, then the council may do the same and the said company shall pay the cost thereof to said village, and said village shall have the right to collect such cost from said company by civil action.

SEC. 7. That iron or wooden poles may be used in the construction of said street railway. The poles and wires thereof shall be so located and maintained as to prevent any interference or damage to the electric-light wires and to existing telephone and telegraph lines and the fire alarm or police patrol wires of said village, and the village council shall have the right to determine and establish the height, size, and sightliness and location of said poles; that said poles shall be set perpendicular and kept painted. That all the poles now set on said Liberty and Main Streets shall within thirty days after the passage of this ordinance and its acceptance by said street railway company as herein provided be reset so as to stand perpendicular, and in default of said company so doing said village may take up and remove said poles, and said street railway company shall remove and reset the electric-light pole at the corner of North Main and West Liberty Streets to such place as council may direct.

SEC. 8. That said company after the completion of said street railroad shall run cars over its line of railway as often and according to a schedule hereafter to be fixed by the council.

SEC. 9. That the suits now pending in the court of common pleas of Trumbull County, Ohio, wherein the village of Hubbard and the said street railway company are parties, shall, upon the passage and due publication of this ordinance and its acceptance by said railway company, be each and all dismissed and said railway company shall pay all the costs made on each of said suits. And the said street railway company shall pay to the attorneys of the village of Hubbard for their legal services in the matters relating to the settlement and adjustment of the differences between said company and said village and their services in said suits of sum of $700, which shall be in full thereof.

SEC. 10. That said The Youngstown & Sharon Street Railway Company shall carry passengers as herein provided and for the following rates of fare and shall sell tickets as herein provided:

(*a*) From any point in the village of Hubbard to any point not exceeding one and one-half (1½) miles beyond the corporation limits of said village on its lines either towards Youngstown or towards Sharon or to any intermediate point and from any such point to any such point in said village of Hubbard for a single cash fare of (5) five cents.

(*b*) From any point in the village of Hubbard to any point on its line in the city of Youngstown and from any point in said city to any point on its line in said village for a single cash fare of (12) twelve cents.

(*c*) From any point in the village of Hubbard to any point on its line in the borough of Sharon and from any point on its lines in said borough to any point on its line in said village for a single cash fare of (13) thirteen cents.

(*d*) Said street railway company shall, upon a demand of any person entering any of its cars within the limits of the village of Hubbard of the conductor or other person in charge of such car, sell such a person a ticket to Youngstown and return for (20) twenty cents, which shall entitle the purchaser thereof to ride upon any of said company's passenger cars operated over said line from a point in the village of Hubbard to any point on its line in the city of Youngstown, and the return portion of said ticket shall entitle holder thereof to ride upon any of the company's cars operated over said line from any point on its line in the city of Youngstown to any point on its line in the village of Hubbard. The return portion of said ticket shall be received by said company for fare between said city as aforesaid and said village as aforesaid in either direction whenever presented therefor. And said street railway company shall upon like demand by any person entering any of its cars within the limits of the village of Sharon and return for a like sum which shall in like manner entitle the purchaser to ride upon any of the company's cars from any point on its line in village of Hubbard to any point on its line in the borough of Sharon, and the return portion of said ticket shall entitle the holder thereof to ride on any of the company's cars operated over said line from any point on its lines in said borough of Sharon to any point on
16 its line in the village of Hubbard or from any point in village of Hubbard to any point in the borough of Sharon. And the return portion of said ticket shall be received by said company for fare as aforesaid whenever presented therefor.

(*e*) Said street railway company shall upon demand therefor by any person entering any of its cars within the limits of the village of Hubbard, of the conductor or any other person in charge of such car, sell such person eleven round-trip tickers for $2.00, any one of which shall entitle the holder thereof to ride on any of the cars of said company from any point on its line in the village of Hubbard to any point on its line in the city of Youngstown or to any point in the borough of Sharon on its line, and the return portion of such tickets shall entitle the holder thereof to ride from any point on its line in the city of Youngstown or the borough of Sharon to any point on its line in the village of Hubbard in either direction whenever presented therefore. And said railway company shall keep conductors or other persons in charge of its cars constantly supplied with tickets of the several kinds hereinbefore prescribed so as to supply persons and

passengers therewith upon their demand as provided therein. Said company shall keep said tickets on sale at some convenient place in the village of Hubbard where persons living in or residents or citizens of said village may at all reasonable times, upon request and tender of payment of the sum herein prescribed, conveniently obtain and purchase the same. Each of said round-trip tickets shall be so made and printed that the return part thereof can be easily detached from the other part thereof.

(*f*) Said street railway company shall sell to any person on demand commutation tickets as follows: One commutation ticket, good for thirty days after the date of purchase for fifty-four single trips over its said line of railway from any point in the village of Hubbard to any point in the city of Youngstown and from any point in the city of Youngstown to any point in the village of Hubbard. And said company shall sell in like manner a like ticket good for a like time and a like number of trips from any point in the village of Hubbard to any point in the borough of Sharon and from any point in the borough of Sharon to any point in the village of Hubbard. Such commutation tickets shall be sold for $3.80 each.

SEC. 11. Children five years of age and under when accompanied by some person having them in charge shall be carried free over any portion of said company's lines throughout its entire extent.

(*a*) Said street railway company shall sell to any student who is attending any public schools in the city of Youngstown on demand a school commutation ticket good for thirty days after the date of purchase for 46 single trips over its said line of railroad from any point in the village of Hubbard to any point in the city of Youngstown and from any point in the city of Youngstown to any point in the village of Hubbard. Such commutation tickets shall be sold for $2.40 each.

(*b*) In case the Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns, shall hereafter reduce its rates of fare between points mentioned in sec. 10 and its subdivisions thereof, then the rates of fare charged to persons taking passage upon its cars in Hubbard for other points mentioned in said sec. 10 and its subdivisions thereof shall be reduced proportionately to same rates.

SEC. 12. That in case said street railway company or any of its conductors or any other person in charge of any of its cars operated over its line of railroad fail or refuse to sell to any of the persons herein prescribed upon request any of the various classes of
17 tickets herein provided for, or in case said company fails or refuses to keep such tickets on sale at a convenient place in the village of Hubbard as prescribed herein, then and in that event it shall be unlawful for said company to charge such persons whether going from the village of Hubbard to or towards Youngstown or to or towards the borough of Sharon or any point therein to Hubbard a rate of fare not to exceed one cent per mile for the distance traveled by such person or to receive any fare from him in excess of one cent

per mile as aforesaid; provided, however, that said company shall not be required to accept or receive for a single fare less than 5 cents.

SEC. 13. That said street railway company shall cause each and all of its cars to stop within the limits of the village of Hubbard at convenient places, not less than three in number, to be designated by the village council, to take in and let off passengers; provided, however, that if said company operate a through special car or cars from Youngstown to Sharon at a high rate of speed, such cars shall not be required to make more than two stops within the limits of said village, which stopping places shall be designated by the council of said village.

SEC. 14. Any conductor or other person in charge of any cars operated by said street railway company over said line of road from Youngstown to Sharon or intermediate points who fails or refuses for any reason to sell any of the classes of tickets herein provided for on demand and offer to pay therefore the sum herein fixed shall upon arrest and conviction thereof be fined not less than $5.00 and not more than $15.00 and pay the costs of prosecution and stand committed until fine and costs are paid.

SEC. 15. That the terms and conditions of this ordinance, and especially the rates of fare herein fixed, shall be obligatory on the said Youngstown & Sharon Street Railway Company, its successors, lessees, and assigns.

SEC. 16. That the rights and privileges granted by this ordinance and the liabilities imposed herein shall continue in force up to and until the first day of January, A. D. 1925.

SEC. 17. That said railway company shall pay the cost of advertising this ordinance.

SEC. 18. That this ordinance, nor any part nor any section thereof, shall take effect and be enforced until after its passage and legal publication nor until said The Youngstown & Sharon Street Railway Company shall have accepted the same in writing, deposited with the clerk of the village of Hubbard the said sum of seven hundred dollars, and deposited with the clerk of said village the sum of one hundred dollars to secure the payments of the purchase price for a portion of the electric-light plant lot in case of sale of same.

Passed in council this 12th day of September, 1901.

Sept. 19.

W. H. DAVIS, *Mayor.*
T. S. CLINGAN, *Clerk.*

I hereby certify the above ordinance was published in the Hubbard Enterprise September 19, 1901.

T. S. CLINGAN, *Clerk.*

18 *Exhibit to bill.*

7256

INTERSTATE COMMERCE COMMISSION.

No. 12123.

Ohio rates, fares, and charges.

In the matter of rates, fares, and charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

Submitted May 5, 1921. Decided November 7, 1921.

Certain intrastate passenger fares maintained by petitioner in Ohio found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Fares prescribed which will remove such preference, prejudice, and discrimination.

Douglass D. Storey and Hause, Evans & Baker for petitioner.
John J. Boyle for village of Hubbard, Ohio.
J. H. Leighninger for city of Youngstown, Ohio.

Report of the commission.

By the commission:

This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, hereinafter referred to as the petitioner, which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The petition alleges that by reason of a franchise contract with the village of Hubbard, made in 1901 by its predecessor, the petitioner is unable to increase its passenger fares between Hubbard and Youngstown to the basis of its fares between Hubbard and Sharon, resulting in undue and unreasonable preference and advantage to persons traveling between Youngstown and Hubbard, and in undue prejudice and disadvantage to other persons traveling interstate between Sharon and Hubbard and to the city of Sharon, and also in unjust and unreasonable discrimination against interstate commerce. It is further alleged that petitioner's inability to increase its intrastate fares to a reasonable basis deprives it of sufficient revenue to pay its operating expenses and the cost of maintaining its property devoted to said service.

19 In 1917 the Youngstown-Sharon Street Railway Company, the original corporation owning the Youngstown-Sharon line,

was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. Later it became necessary to eliminate smaller portions of the railway operations, and on November 1, 1920, a new corporation, the Pennsylvania-Ohio Power & Light Company, the petitioner herein, was formed to take over the Youngstown-Sharon line. The entire common stock of the petitioner is owned by the Pennsylvania-Ohio Electric Company, but its bonds and notes are held by the public, as is also its preferred stock. The line acquired by the petitioner extends only to the Ohio-Pennsylvania State line, and the company operates into Sharon over the tracks of the Shenango Valley Traction Company. The petitioner acquired no power plant, but purchases power from the Ohio-Pennsylvania Electric Company on the basis of actual cost to generate.

Petitioner maintains a regular interurban passenger service every half hour between Youngstown and Sharon. It also maintains additional separate services between Hubbard and Youngstown and Hubbard and Sharon. Petitioner is also engaged in the transportation of freight, as will be later explained. Passenger fares only are involved.

A franchise ordinance passed by the village of Hubbard in 1901, and accepted by the Youngstown & Sharon Railway, one of the predecessors of petitioner, provided for the maintenance between Hubbard and Sharon of a cash fare of 13 cents, and between Hubbard and Youngstown of a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown, and yield, in the order named, 1.37, 1.14, 1.04, and 0.81 cents per mile. Effective February 15, 1920, the Mahoning & Shenango Railway & Light Company, then operating the petitioner's line, by its tariff duly filed with this commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with this commission its tariff I. C. C. No. 4, in which it proposed to establish the same fares between Hubbard and Youngstown as those in effect between Hubbard and Sharon, above
20 enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It was also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, yielding 2.41 cents per mile, and the 54-trip commutation ticket between those points from $9 to $10, or to a basis of 1.27 cents per mile. This tariff became effective on interstate travel

October 1, 1920, and was adopted by the petitioner, the successor to Pennsylvania-Ohio Electric Company, on November 25, 1920. A tariff carrying the same fares was rejected by the Public Utilities Commission of Ohio in so far at it attempted an increase in the fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the franchise contract. Refusals of the Public Utilities Commission of Ohio to allow increases in fares in similar cases have been sustained by the Supreme Court of Ohio. The petitioner shows that prior to filing this petition it and its predecessors exhausted all means through negotiation with the village of Hubbard and otherwise to obtain relief from the franchise fares between Hubbard and Youngstown, but without avail.

The fare applicable to local traffic within the corporate limits of the village of Hubbard is 5 cents and within the corporate limits of Youngstown 9 cents. Petitioner does not seek an increase in these fares. However, under the Hubbard franchise petitioner is also required to maintain the 5-cent fare between any point within the village and any point not exceeding 1.5 miles beyond the limits of the village in either direction. It developed at the hearing that petitioner seeks to limit the 5-cent fare to points within the village of Hubbard. It was also developed at the hearing that under an ordinance of the county commissioners of Mahoning County, Ohio, petitioner is also required to maintain a 5-cent fare between Youngstown and the Mahoning-Trumbull County line, which is 5.40 miles from petitioner's terminal in Youngstown. It desires to increase this fare to 10 cents. The petition on which the order of investigation herein is based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with the interstate fares between Hubbard and Sharon. As the petition disclosed no complaint against the fare between Youngstown and the county line referred to the authorities of Mahoning County were not served with a copy of our order of investigation herein.

The fares proposed by petitioner between Hubbard and Youngstown—20 cents one way, 8 tickets for $1, and 54-trip commutation ticket for $5—yield revenue, per passenger-mile, in the order named, of 2.29 cents, 1.43 cents, and 1.06 cents.

21 Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown which is good in either direction, the through fare is defeated by either 5 or 6 cents according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between Hubbard and Youngstown. While the petitioner's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted.

The following table taken from exhibits of record gives a summary of passenger revenue and operating expenses for the year 1920, and, based on the traffic during January, 1921, estimates of what the result of operation will be for the entire year 1921, under the present fares, and what it would be under the proposed fares. The figures submitted do not include any reserve for depreciation, renewals, or for interest on funded and unfunded debt. With the exception of a few items directly related to freight traffic, which were omitted, all of the operating expenses were charged to passenger traffic.

	Actual for 1920.	Estimate for 1921 (present fares).	Estimate for 1921 (proposed fares).
Revenue	$332,173.43	$367,529.22	$417,127.00
Operating expenses:			
Way and structures	48,164.07	65,500.00	65,500.00
Equipment	67,544.52	63,600.00	63,600.00
Power	46,327.22	37,600.00	37,600.00
Transportation	107,005.25	129,400.00	129,400.00
Traffic	595.55	1,200.00	1,200.00
General and miscellaneous	52,129.58	54,000.00	54,000.00
Taxes	23,309.36	23,779.07	24,491.94
Total expenses and taxes	345,075.55	375,079.07	375,791.94
Balance	[1] 12,902.12	[1] 7,549.85	41,335.06

[1] Deficit.

22 It will be noted that the estimated cost of power in 1921 is substantially lower than the 1920 cost. This is due to the fact that the power is purchased at the switchboard cost and a reduction in the cost of coal is estimated. Power cost in 1920 was 1.42 cents per kilowatt hour and the 1921 estimate is 1 cent.

It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the

intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85, as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25.

The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919, the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year.

The petitioner submitted a valuation of its physical properties, but for the purposes of this investigation it is unnecessary to discuss it. Without consideration of returns on any value whatever, deficits are encountered.

23 The position of the village of Hubbard is summed up in a statement contained in its brief as follows:

To the claim made by the petitioner that the rates of fare fixed and prescribed by the terms of said franchise ordinance do not provide sufficient compensation or income to maintain proper service and afford a sufficient return on the capital invested, our answer is that this is not the concern of the village of Hubbard, for a bargain is a bargain, and a contract duly entered into by persons competent to enter into it is binding upon all parties and can not be modified or changed without the consent of all parties. The street railway company had an equal opportunity with the village of Hubbard of looking into the future and foreseeing conditions that might arise, and accepted the contract with its burdens as well as its privileges. The evidence shows that ever since the acceptance of the ordinance in 1901 this company has collected these rates of fare provided by the ordinance, while other companies in other localities were carrying

passengers for a less rate of fare over a similar distance, and in justice to all they must consider the fat years with the lean ones, and in so considering a much greater period of time elapsed between 1901 and 1917, when expenses increased and earnings fell off more than from the latter date to the present time, of which the petitioner complains.

The answer to this is that if the maintenance of fares fixed by a franchise contract results in unjust discrimination against interstate commerce, it is within our power to remove it by prescribing other and different intrastate fares.

It is not shown that the present interstate fares between Hubbard and Sharon or between Sharon and Youngstown are unreasonable. On the other hand they appear to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory. For illustration, the fares of the Youngstown & Suburban Railway, extending from Youngstown to Leetonia, 19 miles, and of the Northern Ohio Traction & Light Company, extending from Cleveland to Urichsville, 103 miles, are on a basis of approximately 3 cents per mile.

We are of opinion and find that the interstate passenger cash and 54-ride commutation fares of the Pennsylvania-Ohio Power & Light Company between Sharon and Hubbard, also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; and that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted and will result in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the state of Ohio and between points in the state of Ohio and Sharon, Pa.; in undue preference and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

24 We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the petitioner under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares herein found reasonable between Hubbard and Sharon.

An appropriate order will be entered.

Commissioners Aitchison, Potter, and Campbell dissent.

25 ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12123.

Ohio Rates, Fares, and Charges.

In the Matter of Rates, Fares, and Charges of the Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased.

It is further ordered, that this order shall take effect on or before January 4, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

26 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

(Filed Dec. 29, 1921.)

United States of America, by its counsel, now comes and moves the court to dismiss the bill of equity filed against it in the above-entitled cause.

As grounds for this motion it is shown—

1. The plaintiff is without interest in the controversy and has no standing in this court to maintain the bill.

2. The bill is without equity on its face and does not state any cause of action against the United States.

Wherefore, defendant prays that its motion be sustained.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. S. WERTZ,
United States Attorney.

27 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss plaintiff's bill.

(Filed Dec. 23, 1921.)

To the Honorable the Judges of said Court:

And now, this ——— day of December, 1921, the Pennsylvania-Ohio Power & Light Company, one of the above-named defendants, by its attorneys, moves your Honorable Court to dismiss the bill for the following reasons:

1. The bill on its face discloses not ground for equitable relief.

2. By the act to regulate commerce (act of 4 February, 1887, 24 Stat. L. 379), as amended, and particularly as amended by the transportation act of 1920 (act of 28 February, 1920, 41 Stat. L. 456), the Congress has conferred upon the Interstate Commerce Commission authority to make and enter the order herein attacked.

3. The said order of the Interstate Commerce Commission does not violate any provision of the Fifth Amendment to the Constitution of the United States.

4. The said order of the Interstate Commerce Commission was made and entered pursuant to its statutory powers granted by the Congress by the aforesaid acts, and under Article VI,
28 section 2 of the Constitution of the United States, the aforesaid acts of Congress, and the said order of the Interstate Commerce Commission are the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or the laws of the State of Ohio to the contrary notwithstanding.

5. The said order of the Interstate Commerce Commission impairs no obligation of any contract between the plaintiff and this defendant, The Pennsylvania-Ohio Power & Light Company; but even if it did, there is no constitutional prohibition restraining the Congress from impairing the obligation of any contract.

Wherefore, the Pennsylvania-Ohio Power & Light Company moves your Honorable Court to dismiss the bill at the cost of the plaintiff, and it will ever pray, etc.

HARRINGTON, DE FORD, HEIM & HUXLEY,
HAUSE, EVANS, AND BAKER,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Receipt of a copy of the within motion is hereby acknowledged this 23rd day of December, A. D. 1921.

VILLAGE OF HUBBARD,
By JOHN J. BOYLE,
Its Attorney.

29 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Interstate Commerce Commission.

(Filed Dec. 29, 1921.)

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering the first and second paragraphs of the bill, this defendant, which for convenience will be referred to hereinafter as the commission, admits, for the purposes of this suit, that the allegations contained in said paragraphs are true, except that it denies that defendant The Pennsylvania-Ohio Power & Light Company is a street railway and alleges that it is a common carrier by railroad engaged in the transportation of passengers and property from points in one State to points in another State.

II.

30 Answering the third and fourth paragraphs of the bill, the commission admits, for the purposes of this suit, that the allegations contained in said paragraphs are true.

III.

Answering the fifth paragraph of the bill, the commission disclaims information sufficient to form a belief as to the accuracy of the allegations contained therein, and therefore the commission neither admits nor denies the truth of such allegations.

IV.

Answering the sixth to the twelfth paragraphs, inclusive, of the bill, the commission admits and alleges that, upon petition by defendant, The Pennsylvania-Ohio Power & Light Company, alleging that the observance by it of various franchise ordinances and regulations imposed by the authority of the State of Ohio causes and results in undue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce and results in unjust and unreasonable discrimination against interstate commerce, the commission, on January 27, 1921, instituted an investigation, docketed as No. 12123, to determine, among other things—

* * * the reasonableness of petitioner's interstate rates, fares, and charges as shown in said I. C. C. No. 4 and whether the rates, fares, and charges required by authority of the State of Ohio to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *.

The commission further alleges that copies of the order of investigation and of the notice assigning the case for hearing were sent by registered mail, among others, to the Governor of Ohio, the Governor of Pennsylvania, the Public Service Commission of Pennsylvania, the Public Utilities Commission of Ohio, and to the mayors of Youngstown, Ohio, Sharon, Pa., and Hubbard, Ohio; that the
31 full hearing provided for in section 13 of the interstate commerce act was accorded to all interested parties; that at said hearing a large volume of testimony and other evidence bearing upon the matters under investigation was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued, both orally and in briefs, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made its report, findings, and order in said docket No. 12123, Ohio rates, fares, and charges, 64 I. C. C. 493, which are attached hereto, marked "Exhibit A," and are hereby referred to and made a part hereof.

The commission further alleges that said findings were and are, and each of them was and is, fully supported and justified by the record before the commission in said proceeding.

The commission further alleges that in making said report, findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making them it did not exceed the authority which was duly conferred upon it, or exercise that authority in an unreasonable manner.

V.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the peti-
32 tion herein in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact included in the commission's said report, findings, and order.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By WALTER MCFARLAND, *Counsel.*

P. J. FARRELL, (signed)
P. J. FARRELL,
Of Counsel.

[Affidavit of C. C. McChord to above paper omitted in printing.]

33 *Exhibit A to answer.*

[Omitted, printed side p. 18.]

43 [File indorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Pennsylvania-Ohio Power & Light Company.

(Filed April 1, 1922.)

The Pennsylvania-Ohio Power & Light Company, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the plaintiff's amended bill of complaint contained for answer thereunto,

or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, avers and says:

1. Answering the first paragraph of the bill, this defendant admits, for the purposes of this suit, that the allegations contained therein are true except that it denies that it owns and operates an electric street railway which runs between Youngstown, Ohio, to the Ohio-Pennsylvania State line, a distance of about 12 miles, and alleges that it owns and operates a high-speed interurban electric railroad between Youngstown, Ohio, and Sharon, Pennsylvania, a distance of 14.5 miles, the greater part of which is on private right of way and of standard gauge construction, and is common car-
44 rier by railroad engaged in the transportation of passengers and property from the State of Ohio to other States and vice versa, being incorporated under the provisions of section 8625 of the General Code of Ohio and having the power of eminent domain.

2. Answering the second paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true.

3. Answering the third paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the Youngstown & Sharon Street Railway Company was in the form of a street railway and that this defendant operates it as a street railway division, and alleges that it was in form a common carrier by electric railroad engaged in the general transportation of persons and property, and is operated by this defendant as a common carrier by electric railroad engaged in the general transportation of persons and property from the State of Ohio to other States, and vice versa.

4. Answering the fourth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the said franchise ordinance or contract fixed the lawful rates of fare which might be collected for the transportation of persons, and alleges that the rates of fare therein contained were at the date of said contract or franchise ordinance and ever since have been subject to modification as is provided by the interstate commerce act as amended.

5. Answering the fifth paragraph of the bill, this defendant is not informed as to the truth of the allegations contained therein, and if the same be material requires strict proof thereof.

6. Answering the sixth paragraph of this bill, this defend-
45 ant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that it had a lawful right to file such tariff with the Interstate Commerce Commission (hereinafter called the commission), and that the rates contained therein, and especially the rates, fares, and charges between Youngstown, Ohio, and Sharon, Pennsylvania, and between Hubbard, Ohio, and Sharon, Pennsylvania, were and are (except in so far as they have been modified by subsequent tariffs) the legal rates and the

only rates which this defendant can collect for the transportation of passengers between said points.

7. Answering the seventh paragraph of this bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, except that it denies that the tariff filed with the commisison further increased the rates of fare between Hubbard, Ohio, and Sharon, Pennsylvania, and avers that the said rates between said points were the same as those contained in the tariff mentioned in the sixth paragraph of the bill.

8. Answering the eighth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that a tariff containing rates for the transportation of passengers between Youngstown and Hubbard, Ohio, similar to those contained in the tariff filed with the commission, was filed with the public utilities commission of Ohio and was rejected by said public utilities commission, which ordered this defendant to refile a tariff containing rates as set forth in said contract or franchise ordinance.

9. Answering the ninth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges the rates collected for the transportation of passengers between Hubbard, Ohio, and Sharon, Pennsylvania, are the rates contained in the tariffs lawfully filed and published with the commission and are the legal rates and the only rates which this defendant can collect.

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10. Answering the tenth paragraph of the bill, this defendant admits, for the purpose of this suit, that the allegations contained therein are true, and alleges that it filed a petition with the commission under the provisions of section 13 of the interstate commerce act as amended alleging that the rates, fares, and charges made and imposed by the said contract or franchise ordinance of the plaintiff and by the said public utilities commission of Ohio caused an undue and unreasonable advantage, preference, or prejudice as between persons in the said city of Youngstown, Ohio, and in the said village of Hubbard, Ohio, and to said localities in intrastate commerce on the one hand and interstate commerce on the other hand, and caused an undue and unreasonable and unjust discrimination against the said city of Sharon, Pennsylvania, and persons in interstate commerce, and against interstate commerce itself.

The defendant further alleges that the commission on January 27, 1921, instituted an investigation, docketed as No. 12123, to determine, among other things:

"the reasonableness of petitioner's (the defendant herein) interstate rates, fares, and charges as shown in said I. C. C. No. 4, and whether the rates, fares, and charges required by authority of the State of Ohio to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, prejudice

as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *."

Copies of this order of investigation, together with the notice assigning the case for hearing, were sent by registered mail, among others, to the Governors of the State of Ohio and the Commonwealth of Pennsylvania, the Public Service Commission of the Commonwealth of Pennsylvania, the public utilities commission of
47 Ohio, and to the mayors of Youngstown and Hubbard, Ohio, and Sharon, Pennsylvania.

A full hearing as is provided in section 13 of the interstate commerce act as amended was accorded to all interested parties and at said hearing the plaintiff, the said city of Youngstown, and this defendant were represented by counsel; that at said hearing a large volume of testimony and exhibits bearing upon the matters under investigation was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued both orally and in briefs by counsel for the aforesaid parties, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made and entered its report, findings, and order in said docket No. 12123, and published the said report, findings, and order, Ohio Rates, Fares & Charges, in volume 64 of the Interstate Commerce Commission's reports, page 493, a copy of which is attached to the answer of the commission in this suit, and hereby adopted by this defendant.

The said report, findings, and order were and are, and each of them was and is, fully supported and justified by the record before the commission in said proceedings, and were not made by it either arbitrarily or unjustly or contrary to relevant evidence, or without evidence to support them; and that in making them the said commission did not exceed its authority which has been duly conferred upon it, or exercise that authority in an unreasonable or arbitrary manner, but carefully considered every fact, circumstance, and condition called to its attention by the aforesaid parties to said proceeding, including all the matters covered by the allegations set forth in this bill.

11. Answering the eleventh paragraph of the bill, this de-
48 fendant alleges that the same sets forth conclusions of law and denies that the report and order of the commission are void for the reasons set forth therein, but are valid and in accordance with law.

12. Answering the twelfth paragraph of the bill, this defendant alleges that the same sets forth conclusions of law, and denies that the plaintiff has been injured in its property rights and has no adequate remedy at law and will suffer irreparable injury, and alleges

that the plaintiff has no property rights which have been injured and has no standing to maintain this bill, and has an adequate remedy at law and will not suffer irreparable damage.

13. Except as herein expressly admitted, this defendant denies the truth of each and of all allegations contained in the plaintiff's bill in so far as they conflict either with the allegations of this answer or with the statements or conclusions of fact included in the commission's report and order.

All of which matters and things the Pennsylvania-Ohio Power & Light Company is ready to aver, maintain, and prove as this Honorable Court shall direct.

Wherefore, this defendant prays that the plaintiff's bill shall be dismissed with costs. And it will ever pray.

DOUGLASS D. STOREY,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

HARRINGTON, DE FORD, HUXLEY & SMITH,
Youngstown, Ohio.

HAUSE, EVANS & BAKER,
Harrisburg, Pa.
Of counsel.

49 [Affidavit of G. T. Seely to above paper omitted in printing.]

50 [File endorsement omitted.]

In the District Court of the United States, for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion for an interlocutory injunction.

(Filed Dec. 12, 1921.)

Now comes the plaintiff in the above-entitled suit, The Village of Hubbard, by its attorneys, and moves this Honorable Court to grant a writ of injunction against said defendant and each of them, their agents, attorneys, clerks, servants, and employees pending this suit and until the further order of the court conformable to the prayer of the bill in said case filed.

JOHN J. BOYLE and
MOORE, BARNUM & HAMMOND,
Attorneys for The Village of Hubbard.

51 [File endorsement omitted.]

In the District Court of the United States, for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Opinion.

(Filed March 13, 1922.)

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

Westenhaver, District Judge:

This suit is brought under the terms of the act of October 22, 1913. (U. S. Comp. Stat. 1916, sec. 998.) Plaintiff seeks a preliminary injunction restraining the Pennsylvania-Ohio Power & Light Company from putting into effect an order of the Interstate Commerce Commission made November 7, 1921. This order requires that company to cease and desist from practicing a certain undue prejudice, preference, advantage, and unjust discrimination found by the commission to exist in the relation of intrastate and interstate passenger fares, and to establish, put in force, and maintain a certain schedule of passenger fares for the transportation of passengers in intrastate commerce between Hubbard, in the State of Ohio, and Youngstown, in the State of Ohio.

52 This cause has been heard, argued, and submitted upon plaintiff's application for a preliminary injunction; the motion of the defendants, the United States and the Pennsylvania-Ohio Power & Light Company, to dismiss plaintiff's bill; and upon the merits as affecting plaintiff's right to relief, as they arise upon an answer filed by the Interstate Commerce Commission. The motion to dismiss is on two grounds—(1) that plaintiff is without interest in the controversy and has no standing in this court to maintain its bill; (2) that the bill is without equity on its face and does not state a cause of action. The answer of the Interstate Commerce Commission sets up its findings of fact and its order, and contends that inasmuch as these findings are supported by substantial evidence, they are conclusive upon the court, and hence that the plaintiff is not entitled to any relief. On this hearing the full transcript of the proceedings and testimony taken by the Interstate Commerce Commission, in addition to its report and order, were introduced in evidence, and are considered in disposing of the several matters presented for consideration.

Plaintiff assails the validity of the Interstate Commerce Commission's order on several grounds, which, stated in our own language, reduce themselves to two: (1) That Congress has not conferred jurisdiction on the commission over an electric interurban railway company of the kind which the record shows the Pennsyl-

vania-Ohio Power & Light Company to be, particularly over its purely intrastate transportation of passengers conducted under State and municipal franchises which are in legal effect binding contracts: (2) that the franchise granted by the village of Hubbard to the predecessor in title of the Pennsylvania-Ohio Power & Light Company and duly accepted by it and binding as a contract on the present defendant, requires the transportation of passengers between Hubbard, Ohio, and Youngstown, Ohio, at a fixed rate of fares, which franchise contract can not be impaired by an order of the Interstate Commerce Commission, and is, indeed, be-
53 yond the constitutional power of Congress itself to annul and impair. Such, in brief, are the respective contentions.

The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. In 1901, a franchise ordinance was passed by the village of Hubbard and accepted by the Youngstown & Sharon Railway Company, a corporation chartered as a street railway under the statutes of Ohio, to operate between Youngstown, Ohio, and Sharon, Pennsylvania. In 1917 this company was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. On November 21, 1920, a new corporation, the present defendant, the Pennsylvania-Ohio Power & Light Company, was organized to take over and operate the Youngstown-Sharon line. The line thus acquired by defendant, and now operated by it, extends from Youngstown, Ohio, only to the Ohio-Pennsylvania State line, and the defendant operates its cars from the State line into Sharon, Pennsylvania, a fractional part of a mile, over the tracks of the Shenango Valley Traction Company.

The maximum distance from Youngstown to Hubbard is 8.75 miles, and from Hubbard to Sharon is 7.18 miles. The franchise provides for the maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon of a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets good for 22 rides for $2.00, and 54-trip commutation tickets for $3.80. Effective February 15, 1920, this Mahoning & Shenango Railway & Light Company, then
54 the owner and operator of defendant's line, by a tariff filed with the Interstate Commerce Commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between these points. Subsequently, the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, also filed with the Interstate Commerce Commission a tariff in which it proposed to establish

the same rates of fare between Hubbard and Youngstown as those in effect between Hubbard and Sharon, as above stated, and also to increase and establish certain through fares between Sharon and Youngstown, being substantially the sum of the local fares. A tariff carrying these same fares was presented to and rejected by, the Public Utilities Commission of Ohio in so far as it attempted to increase the fares between Hubbard and Youngstown, on the ground that this commission was without jurisdiction to allow and establish rates and charges in excess of those prescribed by franchise contracts. This seems to be the present state of the Ohio law. See Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission, 98 O. S. 303; Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 267; Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission, 98 O. S. 305. In consequence of these complications the Pennsylvania-Ohio Power & Light Company filed its petition with the Interstate Commerce Commission complaining of the undue preference and discrimination existing between interstate and intrastate pasenger fares, which, after notice and on hearing, resulted in the order above stated, which plaintiff is seeking to enjoin.

The Interstate Commerce Commission's findings of fact, it is settled law, are conclusive upon this court if supported by substantial evidence. Interstate Commerce Commission v. Louisville &
54 Nashville R. R. Co., 227 U. S. 88; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Seabord Air Line Ry. Co. v. United States, 254 U. S. 57, 62. The commission's findings of fact in this situation are: That the interstate passenger cash and 54-ride commutation fares between Sharon and Hubbard, and also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted, and will result, in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the State of Pennsylvania and between points in the State of Ohio and Sharon, Pennsylvania, in undue preference and advantage to persons traveling intrastate between points in Ohio, and in unjust discrimination against interstate commerce; also, that whether the passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can, and should, be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found to be reasonable as between Hubbard and Sharon. It is ordered that passenger fares between Hubbard, Ohio, and Youngstown, Ohio, shall be charged which shall not be less than 20 cents

when paid in cash and $5.00 for 54 rides when a commutation ticket is purchased.

Plaintiff's contention that defendant's railroad is not that kind of a railroad engaged in interstate commerce or transportation which is made subject to the jurisdiction of the Interstate
56 Commerce Commission, requires an inquiry as to whether the facts found in this respect by the commission support its assumption of jurisdiction. Plaintiff contends that it is not engaged in the general business of transporting freight in addition to its passenger and express business, and that it is not operated as a part of a general steam-railroad system of transportation. The controversy before the commission involved nothing except passenger fares. In the commission's report it is said: "Petitioner is also engaged in the transportation of freight, as will be later explained." Later in the report the facts in this regard are stated. The defendant has two connections, one direct, and the other over a private siding at Masury and at stop 41, both between Hubbard, Ohio, and Sharon, Pa., with the New York Central Railroad. It does not originate and deliver freight traffic to the New York Central Railroad, but during the year 1919 and 1920, 922 cars of freight were received by it from that line for delivery chiefly at points on defendant's line. The defendant also operates a daily less-than-carload freight or parcel package service between Youngstown and Sharon, and on three days a week operates a through car for such service from Sharon, in Pennsylvania, to Newcastle, Pa. This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant. In 1919 this less-than-carload freight amounted to 6,240 tons and produced a gross revenue of $18,000. The revenue from carload and switching services on cars received from the New York Central was $6,246.52. In 1920 the less-than-carload freight was 5,474 tons and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The passenger revenue receipts for 1920 were $332,173.43 and in 1921 were $367,529.22. Thus it appears that the entire receipts from freight and switching services, including the carload freight
57 from Sharon, in Pennsylvania, to Newcastle, Pennsylvania, are equal, substantially, to 7 per cent only of the entire gross earnings. Plaintiff asserts that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line, and that its less-than-carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight traffic.

Upon these facts logically the first proposition of law to be considered is whether defendant's objection is sound, that the plaintiff is without interest in the controversy and has no standing in court. Neither in the oral argument nor in the briefs filed is this proposi-

tion given much consideration, and no authorities are cited supporting the contention. We assume this contention to be that the village of Hubbard in its corporate capacity has no such interest in the rights of passengers on defendant's railway, even though citizens and residents of the village of Hubbard, as will entitle it to maintain an action in their behalf, and that this case falls within the rules of law announced in Oklahoma *v.* A., T. & S. F. Ry. Co., 220 U. S. 277. In this case it was held that the State of Oklahoma might not sustain an original bill in the United States Supreme Court to enjoin undue discrimination against its citizens in favor of citizens of the State of Kansas. The principles of that case are not applicable. The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared, and was heard. Section 13, interstate commerce act, permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate
58 or fare made or imposed by authority of any State. Obviously, therefore, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard; and if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the commission. It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the commission and to be heard in court against its orders. See Judson on Interstate Commerce, 3rd ed., sec. 437. In City of New York v. United States, et al. (2 C. C. A.), 272 Fed. 768, a municipal corporation, the city of New York was the party plaintiff, and, although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action.

Moreover, Ohio municipal corporations, when parties to a franchise contract, may be parties to actions to enjoin a violation or to enforce the terms thereof. G. C. sec. 4311 and 4312; City of Springfield v. Springfield Gas Co., 12 C. C. (N. S.) 392, affirmed without report. 81 O. S. 537. No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights.

Defendant's objection that plaintiff's bill does not state a cause of action, and plaintiff's objection that the order of the Interstate Commerce Commission is void because defendant's electric street or interurban railway is not brought within the power and authority conferred by Congress on the commission, depend upon the same considerations and will be considered together. Plaintiff's objection that the order of the commission, if within the apparent power

thus conferred on the commission is none the less void, be-
59 cause it invades the reversed power of a State over purely intrastate transportation or because it impairs the obligations of a franchise contract, depends upon separate and independent considerations. We shall consider these propositions in the reverse order.

In the view we take of this case it becomes unnecessary to consider any question of constitutional power on the part of Congress. It is true that franchise grants, under the law of Ohio, are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. It is also true that a franchise of the kind under consideration, fixing the rate to control beyond the limits of the municipality granting it, is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it. See Interurban Railway & Terminal Co. v. City of Cincinnati, 93 O. S. 108; Interurban Railway Co. v. Public Utilities Commision, 98 O. S. 287; City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399. It may also be true that the principles of law announced in Houston & Texas Ry. Co. v. United States, 234 U. S. 343, known as the Shreveport case; American Express Co. v. Caldwell, 244 U. S. 617; Illinois Central Railway Co. v. Public Utilities Commission, 245 U. S. 493; and particularly in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., decided by the United States Supreme Court February 27, 1922, known as the Wisconsin passenger fare case, are not applicable to the precise situation here presented. However, we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention.

60 Plaintiff contends that upon the facts as found the Pennsylvania-Ohio Power & Light Company is not a street electric passenger railway engaged in the general business of transporting freight, in addition to its passenger and express business, nor a street or suburban electric railway operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, but, on the other hand, is a street or interurban electric railway of different character and such as has not been made subject to the jurisdiction of the Interstate Commerce Commission.

Apparently, then, the question at issue comes down to one of power in the Interstate Commerce Commission; that is to say, the power and authority conferred on the commission by the interstate commerce act. That act does not, by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers or all interstate commerce or traffic. It is limited to interstate commerce or transportation carried on by certain kinds of interstate carriers. Thus Mr. Justice Lamar, delivering the opinion in Omaha

Street Railway v. Interstate Commerce Commission, 230 U. S. 324, 336, said: "When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." It was accordingly held that an electric street railway operating in and between Council Bluffs, Iowa, and Omaha, Nebraska, over a bridge across the Missouri River constructed for freight and passenger traffic under an act of Congress was not subject to the jurisdiction nor its rates within the control of the Interstate Commerce Commission. A careful examination, therefore, of the several provisions of the interstate commerce act becomes necessary.

61 From 1887 to 1906 the purview of the act was limited to commerce between the States carried by railroads. By the Hepburn Act of 1906 oil pipe lines, express companies, and sleeping car companies were brought within its scope. By the act of 1910 were added telegraph, telephone, and cable companies. The transportation act of 1920 leaves the provisions of the act as to the carriers subject to the jurisdiction of the commission as they were in these previous acts, but refers more frequently to street or suburban and interurban electric railways in order to exclude them from the purview of certain provisions and sections of the act.

Section 1 provides, among other things, as follows: "That the provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property *wholly by railroad*, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * * but shall not apply (a) to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid." The most material language of the provision above quoted are the words "wholly by railroad" and "transportation of passengers or property * * * wholly within one State." This language was in section 1 of the act of 1887, and has been repeated in this section every time the section has been amended. This section was amended and reenacted with this language in the transportation act of 1920, and must, in ascertaining the meaning of the act, be given equal weight and significance with new paragraphs 3 and 4 of amended section 13, so much relied on by defendants. For the purposes of this case our inquiry is limited to a determination of what are common carriers by railroad, and the further inquiry is, What is a railroad within the purview

62 of this act? The definitions of "common carrier" and of "railroad" and of "transportation" in paragraph 3, section 1, transportation act, 1920, give no aid in answering these inquiries.

It was not until the amendments of June 18, 1910, that street electric railways are mentioned in the act. The authority previously conferred to establish through routes subject to the limitation "that no reasonable or satisfactory through routes exist" was by the 1910

amendment enlarged so that the commission might thereafter, whenever it deemed it necessary or desirable in the public interest, establish through routes without regard to existing routes. This power, however, was limited by a provision in these words: "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character."

This language is ambiguous. Previous to its enactment the Interstate Commerce Commission had assumed jurisdiction over electric street railways carrying passengers alone in numerous cases. See 7 I. C. C. 83; 13 I. C. C. 20; 20 I. C. C. 406; 20 I. C. C. 486. The provision above quoted, it was argued, was an indirect recognition that this jurisdiction was rightfully assumed and also a recognition by implication that electric street railways were railroads as defined in section 1, and were therefore subject to the jurisdiction of the commission. On the other hand, it was urged that this proviso was inserted out of an abundance of caution and to repel the implication that the word "railroad" as used in section 1, did include street electric railways as well as railroads, well-known highways of interstate commerce, as undertood when the original act was passed.

63 In Omaha Street Railway Co. *v.* Interstate Commerce Commission, 230 U. S. 324, decided June 9, 1913, this difference of opinion was settled by holding that "railroads" as used in the interstate commerce act was limited to railroads as distinguished from street railroads, and that the proviso of June 28, 1910, above quoted, was probably inserted out of an abundance of caution and did not warrant the holdings previously made by the Interstate Commerce Commission and by the Commerce Court that ordinary street electric railways engaged in interstate transportation of passengers had been brought within the jurisdiction of the Interstate Commerce Commission. This case will be referred to again at more length, but before doing so the several additional references to street electric railways in the interstate commerce act should be noted.

In section 1, paragraph 22, transportation act, 1920, it is provided: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

New section 15a is, in part, as follows: "When used in this section * * * the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) *street or suburban electric railways* unless operated as a part of a general steam railroad system of

transportation, (c) *interurban electric railways* unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." It should be noted that this definition of the word "carrier" is for the pur-
64 poses of section 15a. That section has for its object the establishment of such tariff rates as will enable the carriers, either as a whole or in groups, to earn an annual net railway operating income equal as near as may be to a fair return upon the aggregate value of their property. In passing it should also be noted that the provisions of this section and of section 20a are the main support of the enlarged jurisdiction of the Interstate Commerce Commission to fix purely intrastate rates, as will appear from a reading of Chief Justice Taft's opinion in the Wisconsin passenger fare case above cited.

New section 20a provides, in part, as follows: "That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation), which is subject to this act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act." This definition likewise is for the purposes of that section, and the section deals with the issue of capital stock or other securities by railroads, and confers wide powers with respect thereto upon the Interstate Commerce Commission.

The foregoing are all the references to street electric railways or interurban railways found in the interstate commerce act. However, two other references thereto are found in other parts of the transportation act of 1920. In section 209, providing for a guaranty to carriers during a limited period after termination of Federal control, it is provided: "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has
65 heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping-car company whose system of transportation is under Federal control at the time Federal control terminates, but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, *which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.*"

In section 300, Title III, creating the labor board to deal with disputes between carriers and their employees and subordinate officials, it is provided: "When used in this title—(1) The term 'carrier' includes any express company, sleeping-car company, and any carrier by railroad subject to the interstate commerce act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Summarizing and bringing together the references to carriers above quoted otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

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Despite these differences in phraseology there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission. If they have those characteristics, obviously they would be under the jurisdiction of the commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

As already stated, the Interstate Commerce Commission early assumed jurisdiction over street or interurban electric railways if engaged to any extent in the interstate transportation of passengers, even if not engaged in the general transportation of freight. See the references above given. In Omaha & Council Bluffs Street Railway Co. *v.* Interstate Commerce Commission, 179 Fed. 243, Circuit Judges Sanborn, Hook, and Adams, differing from

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the Interstate Commerce Commission, held that street railway companies engaged in operating street cars by electricity for the transportation of passengers were not within the definition of common carriers by railroad, as used in section 1 of the interstate commerce act, but that common carriers by railroad meant commercial railroad companies engaged in the general transportation of freight and passengers. Accordingly a preliminary injunction was awarded against the commission's order undertaking to regulate interstate transportation of passengers by an electric street railway. This case was tranferred to the United States Commerce Court, and that court on final hearing reversed the circuit judges. See 195 Fed. 40. The United States Supreme Court, in Omaha Street Railway Co. *v.* Interstate Commerce Commission (supra), reversed the commerce court and affirmed the circuit court. In appraising the force and effect of this decision it is necessary to take into account the long line of Interstate Commerce Commission decisions prior thereto holding to the contrary and to note carefully the reasoning of the commerce court in sustaining them. There is marked similarity in that reasoning and in the reasoning of the later opinions of the Interstate Commerce Commission upon the basis of which the order now under consideration was made.

Mr. Justice Lamar, delivering the unanimous opinion of the Supreme Court holding that street electric railways, although engaged in interstate transportation of passengers, were not common carriers by railroad, as defined in section 1 of the interstate commerce act, gives reasons therefor which, it seems to us, are as sound
68 to-day as they were in 1913. He says: "Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic and for the use of a single community, even though that community be divided by State lines or under different municipal control. When these street railroads carry passengers across a State line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." Further, "The railroads referred to in the act were not those having separate, distinct, and local street lines but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moves in interstate commerce." The mischief which Congress intended to remedy by the interstate commerce act is adverted to as a reason tending to show that street electric railroads were not within the purview of section 1. Street railroads, he said, "had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit." The

question, it is true, is left open as to the proper classification of that new type of interurban railway developed since 1887 and which," with electricity as motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distrnces at high speed. It is intimated that such electric interurban railways might be included within the definition of "common carrier by railroad"
69 as used in section 1, but no opinion is expressed.

So far as we have discovered, the United States Supreme Court has not again given any consideration to this precise question. It has, however, considered the definition of a street or electric interurban railway as used in the safety appliance act and the Federal employers' liability law (see Kansas City v. McAdow, 240 U. S. 51; Spokane & Inland R. R. Co. v. Campbell, 241 U. S. 17), and has held that an interurban electric railway operating from city to city and engaged in interstate traffic is within the purview thereof. The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, and inasmuch as interurban electric railways engaged in the interstate transportation of passengers are within the mischief to be remedied just as much as interstate steam railroads, the exception should be limited to street railways within cities and upon city streets and in their immediate suburbs. On the other hand, the rule of construction applicable to acts of Congress encroaching upon the power of a State to regulate and control the transportation of passengers and property within a State is one of strict construction, and will not include intrastate traffic unless the intent is plainly expressed. Thus, in Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, it is said: "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested."

In South Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537, much relied on by defendants, the de-
70 cision is wholly inapplicable and deals with entirely different questions. Nor does it seem to us that the question under consideration is materially affected, much less controlled, as is contended by defendants' counsel, by the Shreveport case (supra), American Express Co. v. Caldwell (supra), Illinois Central R. R. v. Public Utilities Commission (supra), nor by new paragraphs 3 and 4, section 13, interstate commerce act, nor by the decision in the Wisconsin rate case. The question here is what interstate carriers by railroad and what classes of interstate and intrastate traffic are brought within the jurisdiction of the Interstate Commerce Commission. This is a question of intention, and is to be ascertained from the provisions of the interstate commerce act, including its original as well as amended provisions and the several decisions of the Supreme Court construing the same. The decision in the Wisconsin rate case

rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged. Assuming for the purpose of this opinion the existence in Congress of a power to include all street and interurban electric railways and to invalidate all municipal and State franchises relating to purely intrastate traffic, upon the principles of the Shreveport and the Wisconsin rate cases, nevertheless the intent so to do will not be inferred unless and except so far as it is clearly manifested.

From the foregoing considerations we deduce these conclusions:

Electric street, suburban, or interurban railways are included
71 within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. This, it seems to us, is the only proper interpretation and effect of the several amendments to the interstate commerce act made since the decision in the Omaha Street Railway case. In that case, as already stated, it was left a query as to whether the act included the new type of interurban railroad developed since the original act was passed, which operates with electricity as motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is true that Congress in excluding electric street and interurban railways did not use this descriptive language, but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress
intended to leave, and did leave, all street and interurban
72 electric railways not thus operated nor doing business of that character in the situation in which they were left by the de-

cision in the Omaha Street Railway case. This conclusion is greatly strengthened by the additions to the interstate commerce act made by the transportation act of 1920. The establishment of the labor board to settle controversies between carriers and employees, the *guaranty for* a limited period of a fixed return upon railroads, the grouping of railroads into classes and requiring rates to be fixed so as to allow a fair return to be earned on the property as a whole, the control assumed and exercised over the construction of new railroads, and the making of extensions and the issuance and sale of securities are all a part of a general scheme from which all street or interurban electric railways are excluded unless possessing these characteristics.

The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that
73 the commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

[All italics in sections and in quotations of statutes and from opinions are mine, unless otherwise noted.]

74 In United States District Court.

Order granting preliminary injunction and overruling motions to dismiss filed and entered March 13, 1922. D. C. Westenhaver, Judge.

[Title omitted.]

This cause having been heretofore, to wit, December 27, 1921, heard, argued, and submitted on plaintiff's application for a preliminary injunction, and on the motions of the defendants, United States of America and Pennsylvania-Ohio and Power & Light Company, to dismiss plaintiff's bill, and the court having duly considered the same, it is adjudged, ordered, and decreed that the motions to dismiss be, and they are hereby, overruled, and that a preliminary injunction be, and is, awarded as prayed in plaintiff's bill; that said defendants, and each of them, be, and are hereby, enjoined and restrained, until the further order of this court, from putting into effect the order of the Interstate Commerce Commission made November 7, 1921, a copy of which order is exhibited with plaintiff's bill: plaintiff being a municipal corporation, no bond is required.

75 [File indorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Stipulation for record for final hearing.

(Filed November 20, 1922.)

By their respective counsel, the parties stipulate that the following matter shall constitute the record for the final hearing in the above-entitled cause, viz:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.

7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.

JOHN J. BOYLE,
MOORE, BARNUM & HAMMOND,
Solicitors for Plaintiff.

EDWARD M. REIDY,
Attorney for Interstate Commerce Commission.

BLACKBURN ESTERLINE,
Assistant Solicitor General for the United States.

DOUGLASS D. STOREY,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Light and Power Company.

76 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Final decree.

(Filed and entered November 20, 1922.)

Maurice H. Donahue, Circuit Judge, John M. Killits and D. C. Westenhaver, Judges.

[Title omitted.]

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity be, and the same is, hereby annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is, hereby made permanent; and that the said defendants the Interstate Commerce Commission, and the Pennsylvania-Ohio Power and Light Company and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill.

To all of which the defendants and each of them and their respective counsel severally object and except.

77 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of Appeal of U. S. of America & Interstate Commerce Commission.

(Filed February 3, 1923.)

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.

Service of the above-entitled notice is hereby acknowledged, dated at Columbus, Ohio, this 1st day of February, 1923.

C. C. CRABBE,
Attorney General.

78 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of U. S. of America & Interstate Commerce Commission.

(Filed February 9th, 1923.)

[Title omitted.]

To the Honorable George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32, at pages 220 and 221 of the Statutes of the United States, passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.

Service of the above notice is hereby acknowledged. Dated at Harrisburg, Pa., this 7th day of February, 1923.

GEORGE W. WOODRUFF,
Attorney General.

79 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by United States of America and Interstate Commerce Commission.

(Filed Dec. 21, 1922.)

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the District Court made and entered November 20, 1922, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

80 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the United States and Interstate Commerce Commission.

(Filed Dec. 21, 1922.)

United States of America and Interstate Commerce Commission, defendants, now come, by their respective counsel, and in connection

with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

I. In granting the application for preliminary injunction and in issuing the preliminary injunction enjoining and restraining the defendants from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123.

II. In overruling the motion of the United States to dismiss the bill in equity and in not sustaining the motion.

III. In holding and adjudging that the Village of Hubbard was a proper party to maintain the bill in equity and in not holding
81 and adjudging that the court was without jurisdiction to entertain the same.

IV. In deciding, holding, and adjudging as follows:

No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not, both here and before the Interstate Commerce Commission, become a party to and maintain such suits as are necessary to assert and protect its contract rights.

V. In holding and adjudging that the Pennsylvania-Ohio Power & Light Company was not a common carrier engaged in the transportation of passengers or property, or both, wholly by railroad within the meaning of the act to regulate commerce, as amended.

VI. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order ov November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123, under the power and authority conferred upon it by the act to regulate commerce, as amended.

VII. In deciding, holding, and adjudging as follows:

Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are: (a) Being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission.

VIII. In deciding, holding, and adjudging as follows:

The decision in the Wisconsin Rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13 apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged.

IX. In deciding, holding, and adjudging as follows:

Electric street, suburban, or interurban railways are included within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are
82 of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation or they must be engaged in the general business of transporting freight in addition to their passenger and express business, or they must be operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business.

X. In deciding, holding, and adjudging as follows:

It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case.

XI. In deciding, holding, and adjudging as follows:

Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made

and demurrage began to run as soon as those cars were received by the defendant railway.

XII. In deciding, holding, and adjudging as follows:

Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the commission's report refers thereto as less than carload freight; but this freight service appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business cannot be called the general transportation of freight in addition to its express business.

XIII. In holding and adjudging that the freight express car between Sharon, Pennsylvania, and New Castle, Pennsylvania, does not pass over the lines of the Pennsylvania-Ohio Power & Light Company in the State of Ohio, contrary to the finding of fact by the Interstate Commerce Commission.

83 XIV. In deciding, holding, and adjudging as follows:

This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant.

XV. In issuing the permanent injunction.

XVI. In making and entering the following order or decree:

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them be and they are hereby overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be and the same is hereby annulled, set aside and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be and the same is hereby made permanent; and that the said defendants the Interstate Commerce Commission and the Pennsylvania-Ohio Power & Light Company and each of them be and they are hereby permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court entered November 20, 19221, be reversed, annulled, and set aside with directions that the permanent and the preliminary injunctions shall be dissolved and the bill in equity dismissed and for such other and further order as may be appropriate.

E. S. WERTZ,
United States Attorney, Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

84 In United States District Court.

Order allowing appeal of the United States of America and Interstate Commerce Commission.

Filed December 29, 1922, and entered by Maurice H. Donahue, circuit judge, and John M. Killits and D. C. Westenhaver, district judges.

[Title omitted.]

In the above-entitled cause. United States of America and Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

85 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the Pennsylvania-Ohio Power & Light Co.

(Filed January 18, 1923.)

[Title omitted.]

To the Honorable George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Pennsylvania-Ohio

Power & Light Company, one of the defendants in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

HAUSE, EVANS & BAKER,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Service of the above entitled notice is hereby acknowledged, date at Harrisburg, Pa., this 17th day of January, A. D. 1923.

GEORGE W. WOODRUFF,
Attorney General.
By GUY H. DAVIES,
Law Clerk.

86 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of Appeal by the Pennsylvania-Ohio Power & Light Co.

(Filed January 18, 1922.)

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Pennsylvania-Ohio Power & Light Company, one of the defendants in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the Statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

DOUGLASS D. STOREY and
HARRINGTON, DE FORD, HUXLEY & SMITH,
Attorneys for the Pennsylvania-Ohio Power & Light Company.

Service of the above entitled notice is hereby acknowledged, dated at Columbus, Ohio, this 15th day of January, A. D. 1923.

C. C. CRABBE,
Atty. General.

87 [File indorsement omitted.]

United States District Court, Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by the Pennsylvania-Ohio Power & Light Company.

(Filed December 21, 1922.)

The Pennsylvania-Ohio Power & Light Company, defendant, feeling itself aggrieved by the final order or decree of the District Court made and entered November 20, 1922, by its counsel, prays an appeal therefrom to the Supreme Court of the United States.

The particulars wherein it considers the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

The defendant prays that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

HAUSE, EVANS & BAKER,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

88 [File endorsement omitted.]

United States District Court, Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the Pennsylvania-Ohio Power & Light Company.

(Filed December 21, 1922.)

The Pennsylvania-Ohio Power & Light Company, defendant, now comes, by its counsel, and in connection with its petition for appeal, files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court made and entered November 20, 1922, in the above-entitled cause.

The District Court erred:

I. In granting the application for preliminary injunction and in issuing the preliminary injunction enjoining and restraining the defendants from putting into effect the order of the Interstate Com-

merce Commission of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123.

II. In overruling the motion of the Pennsylvania-Ohio Power & Light Company to dismiss the bill in equity and in not sustaining the motion.

III. In holding and adjudging that the village of Hubbard was a proper party to maintain the bill in equity and in not
89 holding and adjudging that the court was without jurisdiction to entertain the same.

IV. In deciding, holding, and adjudging as follows:

"No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not, both here and before the Interstate Commerce Commission, become a party to and maintain such suits as are necessary to assert and protect its contract rights."

V. In holding and adjudging that the Pennsylvania-Ohio Power & Light Company was not a common carrier engaged in the transportation of passengers or property, or both, wholly by railroad within the meaning of the act to regulate commerce, as amended.

VI. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio Rates, Fares, and Charges," etc., No. 12123, under the power and authority conferred upon it by the act to regulate commerce, as amended.

VII. In deciding, holding, and adjudging as follows:

"Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the commission. These characteristics are: (a) Being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight, in addition to their passenger and express business; (c) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, surburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the commission."

VIII. In deciding, holding, and adjudging as follows:

"The decision in the Wisconsin Rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof, unless operated as a part of a general steam railroad system of transportation of freight. The newly added powers and duties, including those conferred by paragraphs 3 and 4 of new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged."

90 IX. In deciding, holding, and adjudging as follows:

"Electric street, suburban, or interurban railways are included within 'common carriers by railroads,' as that expression is used in section 1 of the interstate commerce act, only when they are of the character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920, as above quoted. They must be operated as a part or parts of a general steam railroad system of transporting freight in addition to their passenger and express business, or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act, nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business."

X. In deciding, holding, and adjudging as follows:

"It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics; that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case."

XI. In deciding, holding, and adjudging as follows:

"Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway."

XII. In deciding, holding, and adjudging as follows:

"Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the commission's report refers thereto as less than carload freight; but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business cannot be called the general transportation of freight in addition to its express business."

XIII. In holding and adjudging that the freight express car between Sharon, Pennsylvania, and New Castle, Pennsylvania, does

not pass over the lines of the Pennsylvania-Ohio Power &
91 Light Company, in the State of Ohio, contrary to the finding of fact by the Interstate Commerce Commission.

XIV. In deciding, holding, and adjudging as follows:

"This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio, and is transported on a line not owned by defendant."

XV. In issuing the permanent injunction.

XVI. In making and entering the following order or decree:

"This cause came on for final hearing at this term on the record as stipulated by the parties, as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

"First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

"Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

"Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants the Interstate Commerce Commission and the Pennsylvania-Ohio Power & Light Company, and each of them, be, and they are hereby, permanently enjoined and restrained from putting into effect the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with plaintiff's bill."

Wherefore defendant prays that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and preliminary injunction shall be dissolved, and the bill of complaint dismissed, and for such other and further order as may be appropriate.

HAUSE, EVANS, AND BAKER,
HARRINGTON, DE FORD, HUXLEY & SMITH,
Solicitors for the Pennsylvania-Ohio Power & Light Company.

92 In United States District Court.

Order allowing appeal of the Pennsylvania-Ohio Power & Light Company.

Filed December 29, 1922, and entered by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entitled cause, the Pennsylvania-Ohio Power & Light Company, defendant, having made and filed its petition pray-

ing an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

It is further ordered that the Pennsylvania-Ohio Power & Light Company shall give bond on appeal in the sum of five hundred ($500) dollars and conditioned as required by law and within ten (10) days from the date hereof.

93 *Appeal bond of the Pennsylvania Power & Light Company for $500.*

(Filed and approved January 11, 1923.)

[Omitted in printing.]

95 [Citation omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 10th day of January, 1923.

MOORE, BARNUM & HAMMOND,
JOHN J. BOYLE,
Solicitors for appellee.

96 [Citation omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 10th day of January, 1923.

MOORE, BARNUM & HAMMOND,
JOHN J. BOYLE,
Solicitors for appellee.

97 In United States District Court.

Order extending time for filing transcript until February 26, 1923.

(Filed and entered by D. C. Westenhaver, Judge.)

[Title omitted.]

On application of defendants and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Supreme Court be extended thirty days.

98 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Præcipe for record.

(Filed Jan. 15, 1923.)

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause and include therein, in the order given below, the following:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. Stipulation for record for final hearing.
9. Final decree.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.

99 13. Præcipe for record.

14. Citation on appeal.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

100 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true, and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with the precipe for transcript filed herein and the originals of which remain in my custody as clerk of said court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 10th day of February, A. D. 1923, and in the 147th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER,
Clerk.

101 [Indorsement on cover:]
File No. 29,420. Northern Ohio D. C. U. S. Term No. 228. The United States of America, Interstate Commerce Commission, and Pennsylvania-Ohio Power & Light Company, appellants, *vs.* The Village of Hubbard, Ohio. Filed February 23d, 1923. File No. 29,420.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1923

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 229.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE CITY OF WELLSVILLE, OHIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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3 UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, *ss:*

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Cleveland, in said district on the first Tuesday in October, being the 3rd day of said month, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America, the one hundred and forty-seventh, to wit, on Monday the 20th day of November, A. D. 1922.

Present: Honorable Maurice H. Donahue, Circuit Judge; John M. Killits, District Judge; D. C. Westenhaver, District Judge, United States Judges.

THE CITY OF WELLSVILLE, OHIO, vs. THE UNITED STATES OF AMERICA, AND THE Steubenville, East Liverpool and Beaver Valley Traction Company, Interstate Commerce Commission.	No. 682. In equity.

Said action was commenced on the 16th day of December, A. D. 1921, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

4 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Complaint in equity.

Filed Dec. 16, 1921.

The plaintiff, the city of Wellsville, Ohio, is a municipal corporation duly organized as a city under the laws of the State of Ohio, and is located in the territory under jurisdiction of the court above designated.

The defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company, is a corporation duly organized under the laws of Ohio and is a common carrier of passengers for hire.

The United States of America is made a defendant in the foregoing action by and under authority of section 968 of the Revised Statutes of the United States as numbered in Barnes Revised Statutes of the United States.

The defendant, the traction company above named, owns and operates an electrical street railway from the western boundary line of the city of Wellsville, Ohio, to the eastern boundary line of the city of East Liverpool, Ohio, a distance of about ten miles, all of which lines operate over and upon the streets of East Liverpool and Wellsville Ohio.

The distance from the business center of the city of Wellsville, Ohio, to the business center of East Liverpool, Ohio, is a distance of about four miles, and all of this right of way, is paved except the part owned by the defendant for a private right of way, and part of this right of way is over the county road leading from Wellsville to East Liverpool; that the greater part of the inhabitants of the city of Wellsville and of East Liverpool are carried each day over the lines of the said traction company to their work, and large numbers of the inhabitants of each city are employed in factories or stores located in the other city, and are carried to and from their work on the lines of the said defendant the traction company above named, and all the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependant upon said street car line for transportation.

The line of said street railway was first constructed and operated in the year 1892, and in order to construct said lines, Albert M. Johnston, Sidney H. Short, and C. E. Grover applied to the council of the city of Wellsville, Ohio, for a franchise to construct such line over the streets of said city, and on September 14th, 1891, at their request, the council of the city of Wellsville Ohio duly adopted an ordinance, which ordinance was duly accepted by said applicants. By the terms of said ordinance said parties and their legal successors in title were given the right to const'uct, maintain, and operate for a period of twenty five years an electrical street railway over certain streets in said city; said ordinan'e further provided that a fare of five cents should be charged for each ride for each passenger over the whole or any part of said street railway or any part thereof or any extention of the same, and said franchise ordinance further provided that the said grantees should place good and sufficient cars upon said line and run them as often and at such rate of speed as public convenience may demand or as the council of said city might require.

And to extend said railway, and in order to provide an extension thereof over the streets and roads of Wellsville, to and through the streets of East Liverpool, Ohio, and Johnston, Short, and Grover obtained at about the date of the said franchise from the city of Wellsville a franchise from the county commissioners of Columbiana County, Ohio, to construct said railway from the easterly corporate line of Wellsville to the westerly corporate line of East Liverpool, and they also on or about said date obtained a franchise from the council of the city of East Liverpool, Ohio, giving them and their successors and assigns the right to construct an electric street car line from the westerly corporation line of said

city to the easterly corporation line thereof, and to use the streets of said city for such purpose.

In pursuance of said franchises so obtained from the cities of Wellsville and East Liverpool and the county commissioners of Columbiana County, Ohio, said Johnston, Grover, and Short built and operated an electric street car line from and through said cities and over said public road.

It was provided in all of said ordinances and franchises so obtained as heretofore stated that the rate of fare over the entire route of said railway or any part thereof should be five cents for each passenger, and before the construction of said street railway said grantees accepted the provisions thereof in writing.

Said grantees so operated said line of railway until they assigned their rights granted under said ordinances and franchises, and by successive assignments the East Liverpool Railway Company, a corporation, became the owner and was the owner on November 19, 1901, of said railroad and all the rights granted by said ordinances, and on that date the East Liverpool Railway Company applied for a franchise to the council of the city of Wellsville, Ohio, and in pursuance of said application the council of said city, on November 19, 1901, duly passed an ordinance by the terms of which the East Liverpool Railway Company, its successors and assigns, was granted the right

7 to construct, maintain, and operate an electric street railway on the streets of said city, to wit, from 18th Street to the southern line of Clark Avenue in said city. It was one of the provisions of said ordinance that said grant should be for a period of twenty-five years, and that the rate of fare should be five cents for each person carried over the line as operated in the cities of Wellsville and East Liverpool and between said cities or on any extension thereof, and it was further stipulated that said company should run good cars over said line as often as required by public convenience or by the city council. Said franchise was duly accepted in writing by said company. It was further provided in said franchise that all the rights granted to Johnston, Sidney, and Short by the council of Wellsville, Ohio, on September 19, 1891, and all the terms of said ordinance should become a part of the ordinance passed November 19, 1901, and said first ordinance was copied into and made a part of the latter ordinance.

Said company under the terms of said franchise at once extended its lines as provided in said ordinance.

Afterwards the council of the city of Wellsville, Ohio, to wit, on the 19th day of September, 1905, on the application of said company, duly passed an ordinance, being ordinance No. 594 of the ordinance of said city, extended the franchise for a period of twenty-five years, the grants owned by said company, and said company duly accepted the terms of said grant in writing, and this ordinance provided that the rate of fare over the entire line between the city of Wellsville to East Liverpool and to and over the entire line or any part thereof should be five cents for each passenger so carried.

That on or about the day of , 1916, the defendant herein, The Steubenville, East Liverpool and Beaver Valley Traction Company, purchased and acquired all the rights and property and franchises of the said The East Liverpool Railways Company in the cities of Wellsville and East Liverpool and from the county commissioners of Columbiana County, Ohio, and now owns and
8 operates the same by reason of the grants heretofore mentioned herein, and subject to all the terms and conditions thereof, and in the year 1905 this defendant traction company built an interurban line of electrical railway from Steubenville, Ohio, to the western corporation line of Wellsville, Ohio, where it connected with the line of railway operated under said franchises from Wellsville to the easterly line of East Liverpool, Ohio, and said traction company has continued to operate its said cars from Steubenville, Ohio, to East Liverpool, Ohio, but the same runs over the line operated from the westerly corporation line of Wellsville to the easterly corporation of East Liverpool under the said franchise ordinances heretofore set forth.

And in the year 1905 the Beaver Valley Traction Company built a line of electric railway from Beaver in the State of Pennsylvania to the easterly corporation line of East Liverpool, Ohio, and run its interurban cars by electricity from the eastern corporation line of East Liverpool, Ohio, over the tracks of said the East Liverpool Railway Company and the East Liverpool Traction and Light Company, owned by the East Liverpool Railway Company, and said the East Liverpool Traction and Light Company from 1905 operated its line from the eastern limits of East Liverpool to the westerly limits of Wellsville, Ohio, and said three companies, continued to so operate over their respective lines until the defendant traction company about the year 1916 acquired by merger all three of said lines. And on or about the day of 1916 said defendant herein by said merger acquired the control or ownership of said car lines and said franchises in and between the cities of East Liverpool and Wellsville, Ohio, and has since said date operated the same under said franchises, and said defendant has no other franchises or right to so occupy the streets of said cities or the highway between said cities except such right as is granted in and by said franchise ordinances of said cities and said county commissioners. That the
9 last grant made by the city of Wellsville, Ohio, and duly accepted by the predecessor in title to said defendant traction company and now owned by this defendant as granted by the council of said city of September 19, 1905, being ordinance number 594, provides in section two thereof that " It is one of the conditions of this ordinance and one of the considerations for this grant for the use of said streets for a double track that grantee or its successors or assigns shall charge for a fare the sum of five cents for each person carried over the entire route from the westerly corporation line of Wellsville, Ohio, to the State line between Ohio and Pennsylvania or any part thereof, but policemen and regularly paid firemen of said city when in uniform shall be carried free."

The corporation line between Ohio and Pennsylvania is also the easterly corporation line of the city of East Liverpool, Ohio.

At the time of the granting of the said ordinance number 594 similar ordinances were granted by the city of East Liverpool, Ohio, and the county commissioners of Columbiana County, Ohio, and all of such ordinances provide that said owner of the franchise may charge the sum of five cents for each passenger carried over the line of said railway in and between said cities or any part thereof.

By the laws of Ohio any such traction company is forbidden to charge any greater rate of fare than that stipulated in any such franchise ordinance so passed by the proper authority of a city or a county and duly accepted by any such traction company.

That notwithstanding such provisions of the laws of Ohio, the defendant traction company are asserting the alleged right, claimed by virtue of the act of Congress passed February 29, 1920, and known as the transportation act of 1920, to disregard the laws of Ohio and are asserting that they are not bound by any of the laws of Ohio, but on the contrary they have the right to put into effect a higher rate of fare than that allowed by said franchises under which it is operating for the transportation of passengers.

That on or about April 12, 1921, said defendant traction company filed an application before the Interstate Commerce Commission, being known as number 12092 on the docket of said commission, praying for an increase in the rate of fare charged on said traction lines described herein between said cities, and on the 7th day of November, 1921, said Interstate Commission directed said traction company to increase the rate of fare over the said lines from the westerly corporation line of Wellsville to the easterly corporation line of East Liverpool, Ohio, so that a passenger riding over said line should and would be compelled to pay the sum of fifteen cents, the said commission by its order dividing the said lines into three zones, to wit, from the westerly corporation line of Wellsville to Kountz, a fare of five cents for each passenger carried; from Kountz to the Diamond in East Liverpool, a fare of five cents for each passenger so carried; and from the Diamond to the easterly line of East Liverpool or the Ohio and Pennsylvania line the sum of five cents, thus making the rate of fare over said line the sum of fifteen cents for each passenger so carried over the entire line of said road and a charge of ten cents over the rate allowed by the franchise ordinances now in effect.

This plaintiff avers that the said act of Congress, known as the transportation act of 1920, does not confer or grant, nor to purport to confer or grant, the authority claimed by these defendants; but if it does purport to grant such authority, then and in that event the plaintiff avers that said transportation act, in so far as it attempts to confer such authority, is unconstitutional, void, and unenforcible, because it would in that event deprive the State of Ohio of its

police power expressly reserved to it by article ten of the
11 Constitution of the United States, and would deprive the plaintiff and its citizens of property without due process of law, and would deprive plaintiff of its right to enter into a franchise contract with any corporation, and would set aside valid and binding contracts without due process of law.

Plaintiff and its officers and employees in the discharge of their duties are obliged to and do travel over the lines of said traction company as passengers, and the fares charged therefor by said traction company, defendant herein, are paid by plaintiff from public funds, and that if the increased rates which defendants are about to put into the effect as herein complained of are charged such officers and employees such increase will be paid by plaintiff and its public funds are thus used and lost.

That the city of Wellsville, Ohio, has a population of about 9,000, and the city of East Liverpool has a population of about 25,000, and that there are about 15,000 persons in the territory surrounding said cities, all of whom are dependant upon the lines of said traction company for transportation, and all of whom do use said lines.

That said defendants are threatening to, and will unless restrained by this court, put into operation in Ohio and on the lines of said street railway rates and fares far in excess of the lawful rates and fares for the transportation of persons and property within the State; that during the year 1920, 3,227,652 persons were so carried over said line, all of whom paid fare as passengers, and there at least that many persons still use said lines as passengers, and if compelled to pay such rate of fares as proposed the people of the State of Ohio and of said cities and its surburban territory will be deprived of thousands of dollars in value and of their rights without due
12 process of law, which will result in great disorder from resistance to such rate so proposed, and in a multiplicity of suits both criminal and civil, and will ignore and deprive the State of its constitutional powers and of its police power, to its irreparable damage, and will result in the taking away the right of plaintiff to enforce its valid contracts, to the irreparable damage to the State of Ohio and to plaintiff, and said State and plaintiff and the citizens so affected are without any adequate remedy at law.

Wherefore plaintiff prays that a temporary injunction may issue against the defendants herein, forbidding each of them to put into effect or operation in intrastate commerce of the State any rate of fare for the transportation of passengers within the State or over the line of said traction company between and within the cities of Wellsville or East Liverpool covered by said franchise ordinances not authorized by the laws of Ohio or by said franchise ordinances of said cities, and that upon final hearing said injunction may be made final and perpetual, and for all proper relief.

CHAS. BOYD,
City Solicitor of Wellsville, Ohio.

[Affidavit of Geo. D. Ingram to above paper omitted in printing.]

13
7262

Exhibit A to complaint.

Interstate Commerce Commission.

No. 12092.

Ohio and Pennsylvania rates, fares, and charges.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

Submitted April 8, 1921. Decided November 7, 1921.

Certain intrastate passenger fares maintained by petitioner in Ohio found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Fares prescribed which will remove such preference, prejudice, and discrimination.

Agnew Hice, T. H. Hogsett, and C. R. Marshall for petitioner.

Edward E. Corn for Public Utilities Commission of Ohio.

Perry L. Rigby for city of East Liverpool, Ohio; Ralph Levinson for city of Steubenville, Ohio; and Charles Boyd for city of Wellsville, Ohio.

Report of the Commission.

BY THE COMMISSION:

This proceeding was instituted by us upon petition filed on behalf of the Steubenville, East Liverpool & Beaver Valley Traction Company, hereinafter called the traction company, operating an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, and also a local service between certain points within Ohio, and a branch line to Chester, W. Va. In substance the petition alleges that by reason of various franchises, ordinances, and regulations imposed under authority of certain municipalities of the States of Ohio and Pennsylvania, the petitioner is unable to increase its fares for the transportation of passengers intrastate to the basis maintained on interstate traffic, resulting in undue and unreasonable advantage and preference to persons and localities in intrastate commerce on the one hand and in undue prejudice and disadvantage to other persons and localities in interstate commerce on the other hand, and also in unjust and unreasonable discrimination against interstate commerce; and, further, is deprived of sufficient revenue to pay its operating expenses, including taxes and the cost of main-
14 taining its property devoted to the service. Passenger fares only are involved.

The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a total

distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio.

The traction company was formed in 1917 by the consolidation and merger of the Steubenville & East Liverpool Railway & Light Company, which owned and operated an electric railway from a point in Steubenville to the boundary line between Columbiana and Jefferson Counties; the East Liverpool Traction & Light Company, which operated an electric railway from the above-mentioned boundary line through Columbiana County to State Line, including street railways in East Liverpool and the line to Chester; and the Ohio River Passenger Railway Company, which operated an electric railway from State Line to Vanport. The main line throughout a greater part of its length is constructed upon a bench cut into the river bluffs, or is supported by embankments, in many cases requiring extensive masonry and retaining walls. It is paralleled by a line of the Pennsylvania system. Between Steubenville and Vanport there are a number of streams entering the Ohio River, necessitating expensive construction for bridges and culverts.

Beside a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. Those in East Liverpool start from a point in the center of the city called "the diamond" and are known as (1) the Chester line, 2.5 miles, crossing the Ohio River on a steel suspension bridge 1,700 feet in length and 90 feet above the water; (2) the river line, 2.7 miles in length, paralleling the Ohio River; (3) the Pleasant Heights line, 1.52 miles; and (4) the Grandview line, 3.28 miles. Both of the latter lines are constructed upon steep grades in order to reach the upper levels on the hilltops north of the city. In City of East Liverpool, Ohio v. S., E. L. & B. V. T. Co., 51 I. C. C., 563, we approved a fare of 10 cents between East Liverpool and Chester and the fares over this branch are not here in issue. In Steubenville there are the Fourth Street and La Belle View lines, 2.29 and 2.91 miles in length, respectively. The La Belle View line is also constructed upon a steep grade. All the branch lines, except that to Chester, are single track. The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction

company handles only freight local to its line. No freight is handled oven the branch lines. The traction company files its tariffs with this commission, and publishes interstate passenger fares between points on its lines. It is subject to our jurisdiction. City of East Liverpool, Ohio, v. S., E. L. & B. V. T. Co., supra.

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport.

The interstate fares of the traction company now in effect are published in its tariffs I. C. C. No. 8. This tariff publishes, among others, fares for through service between Vanport and Steubenville and between all points on its main line both in Pennsylvania and Ohio. It contains no provision for free transfers.

A tariff naming the same scale of fares as carried in I. C. C. No. 8 was permitted to become effective September 20, 1920, by the Public Service Commission of Pennsylvania, but a similar tariff was rejected by the Public Utilities Commission of Ohio on the ground that the fares charged by the traction company in that State were regulated by municipal ordinances and franchises granted to its predecessors and therefore beyond the power of the State authorities to change. Under the terms of franchise ordinances of Wellsville and East Liverpool the traction company is prohibited from charging more than 5 cents for the transportation of passengers between the eastern limit of East Liverpool, which is State Line, and the boundary line between Columbiana and Jefferson Coun-
16 ties, which is approximately the western limit of Wellsville, a distance of 10.7 miles. In addition it is required to furnish free transfers to branch-line points in East Liverpool, except to Chester. The interstate fare from State Line to Woosters, which is also approximately at the western limit of Wellsville, a distance of 10.4 miles, is 20 cents.

By franchise ordinances of the village of Toronto the traction company is required to charge a fare not in excess of 5 cents between Fosterville and Costonia, 4.2 miles, with 13 tickets for 50 cents. These two points are between Country Club and Minors, south of the county line, and the interstate fare between these latter points is 20 cents for 7.2 miles. By franchise ordinances of Steubenville, the traction company may not charge more than 5 cents within that city, or six tickets for 25 cents, with free transfers. This was modified on April 8, 1919, so as to allow a fare of not more than 6 cents, or nine tickets of 50 cents, with free transfers. The increase was limited to expire April 8, 1921. The interstate fare

over the interurban line from the city limits of Steubenville to the end of the line at Sixth Street, 1.7 miles, is 10 cents. The interstate fare over the branch lines in Steubenville is 8 cents, except that between Crawford Avenue and Wellesley Avenue, 4.32 miles, it is 16 cents.

The interstate fare between Smiths Ferry, Pa., and Woosters, Ohio, 11.7 miles, is 25 cents, while the intrastate fare between State Line and Woosters, 10.4 miles, is 5 cents. The fare from Smiths Ferry to State Line is 10 cents and from State Line to Woosters, intrastate, 5 cents. Through passengers may therefore defeat the interstate fare to the extent of 10 cents a trip by buying tickets or tendering cash fares to and from State Line. The interstate fare from East Midland, Pa., to Country Club, Ohio, 29.7 miles, is 65 cents, while the intrastate fare from State Line to Country Club, 24.5 miles, is 40 cents. Here, also, by the use of the intrastate fare from State Line to Country Club, the interstate fare may be defeated to the extent of 10 cents. In the interurban service interstate passengers and intrastate passengers ride in the same cars and over the same rails.

In the following table interstate interurban fares between representative Ohio points on the traction company's line, provided in tariff I. C. C. No. 8, are stated with earnings per mile thereunder. These are compared with the fares and earnings under the intrastate scale between the same points.

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From—	To—	Distance.	Interstate.		Intrastate.	
			Fare.	Earnings per passenger-mile.	Fare.	Earnings per passenger-mile.
		Miles.	Cents.	Cents.	Cents.	Cents.
State Line	East Liverpool (terminal)	3.8	10	2.63	5	1.31
Do	East Liverpool (diamond)	4.1	15	3.66	5	1.22
Do	Woosters (western limit of Wellsville).	10.4	20	1.92	5	.48
Woosters	Kountz	3.9	10	2.56	5	1.28
Steubenville (city limits).	Country Club	2.6	10	3.84	5	1.92
Country Club	Jeddo	3	10	3.33	10	3.33
Jeddo	Myers' Lane	2	10	5	5	2.5
Myers' Lane	Minors	2.2	10	4.54	10	4.54
State Line	Steubenville (city limits)	27.1	60	2.21	45	1.66
Do	Steubenville (Sixth Street)	28.8	65	2.26	51	1.77
Country Club	East Liverpool (diamond)	20.4	50	2.45	40	1.96
Myers' Lane	State Line	19.5	45	2.3	35	1.79

The lower intrastate fares have had the effect of practically denying to the traction company the use of its interstate fares. For example, the through interstate fare from Vanport to the terminus of the line at Sixth Street, Steubenville, 40.2 miles, is 90 cents. A pas-

senger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from Steubenville, and examples could be multiplied.

It is to be noted that between points in Ohio on the traction company's line where fares are not held down by municipal franchises and ordinances the intrastate and interstate fares are more nearly on a parity. For example, between Country Club and Jeddo, 3 miles, and between Myers' Lane and Minors, 2.2 miles, the intrastate fares are the same as the interstate, 10 cents; also between the city limits of Steubenville and Jeddo, 5.6 miles, the intrastate fare is 15 cents, the same as the interstate fare.

In the interurban service between Vanport and Steubenville and intermediate points the fares increase 5 cents for each zone. The minimum fare provided in the interstate schedule is 10 cents. This is not, strictly speaking, a minimum fare, although usually so designated in the record, but is in fact an initial fare and by the manner in which it operates results in the collection of an additional amount of 5 cents. For illustration, three 5-cent zones are included from State Line to Woosters, but by reason of this initial fare a
18 passenger boarding an interurban car at State Line for Woosters pays a fare of 20 cents. If this were a minimum charge the fare would be 15 cents. A minimum fare of 10 cents in interurban service appears to be reasonable and has been approved in numerous instances by the Public Service Commission of Pennsylvania and the Public Utilities Commission of Ohio, but no sufficient justification has been shown on this record for the collection of this amount as an initial fare; provided, however, that this is not to be construed as requiring the maintenance of any interstate fare between points on the traction company's line lower than the intrastate fare contemporaneously maintained between the same points.

The traction company also maintains a local interurban service between State Line and Woosters, the western limits of Wellsville, 10.4 miles, operating through the city of East Liverpool, East Liverpool Township, and Wellsville. The present intrastate fare for this service, as hereinbefore stated, is 5 cents, with free transfers to branch-line points in East Liverpool. This fare yields less than 5 mills per mile. Under its tariff I. C. C. No. 8 the traction company divides this local service into three zones: (1) State Line to diamond in East Liverpool, 4.1 miles; (2) diamond to Kountz, 2.4 miles; (3) Kountz to Woosters, 3.9 miles. An interstate fare of 5 cents is provided for each zone with no transfers. For these respective distances this 5-cent fare yields per passenger-mile revenues of 1.22, 2.08, and 1.28 cents. A 5-cent fare, therefore, for each of these zones

would appear amply justified. The evidence shows that because of the lower intrastate fare the interstate local fares are defeated and the traction company has seldom been able to derive any benefit from them. For example, the interstate fare from Vanport to Woosters is 45 cents. A passenger boarding a car at Vanport with Woosters as his intended destination, by paying the fare of 30 cents to the State Line and then the local intrastate fare of 5 cents to Woosters, effectually evades the payment of the interstate fare from Vanport to Woosters as well as the interstate fare from State Line to Woosters. There is considerable traffic on this local division, the number of revenue passengers for the year ended December 31, 1920, being shown as 3,227,652.

The intrastate fare in effect over the city or branch lines above referred to is 5 cents, except when transfers are used. The interstate fare is 8 cents, except that between Crawford Avenue and Wellesley Avenue, in Steubenville, as above shown, it is 16 cents.

The traction company asserts that because of the low intrastate fares it is unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon; that its bond interest is in default of payment for more than a year; and
19 that the costs of the railway are continually increasing. It is shown that the line in many respects is in a run-down condition. Many bridges and trestles should be immediately repaired or renewed, but the company is unable to remedy this condition because of lack of funds. It has sought relief from the several Ohio municipalities which control the intrastate fares, also from the Ohio Legislature, but without avail. It is averred that unless relief is granted by this commission by removing the unjust discrimination complained of by raising the intrastate fares to the level of the interstate fares it will be compelled in the near future to discontinue its functions as an interstate carrier.

The following table summarizes the results of operation for the years 1918, 1919, and 1920:

	1918	1919	1920
Income	$770,167.50	$840,600.62	$949,171.49
Operating costs	601,980.59	725,893.91	865,997.12
Net income	168,186.91	114,706.71	83,174.37
Taxes	53,932.99	58,841.96	66,441.94
Net income less taxes	114,253.92	55,864.75	16,732.43
Interest on bonds	74,150.00	74,150.00	74,150.00
Interest on unfunded debt		4,650.00	
Interest on deposits	3,705.10	6,173.93	4,799.24
Surplus	43,809.02	*def. 16,761.32*	*def. 52,618.33*

Interest on bonds has not been paid since November, 1919. Wages of conductors, motormen, and trainmen increased from $148,841.25 in 1918 to $162,057.99 in 1920 and $197,522.49 in 1921, and during

those years the cost of power purchased more than doubled, increasing from $60,606.01 in 1918 to $114,196.20 in 1919, and again to $134,613.14 in 1920.

The freight earnings reported in the traction company's annual reports under express were in 1919, $14,864.79 and in 1920, $23,018.09. The evidence indicates that these freight revenues exceed the freight operating expenses.

The traction company also submitted statements of passenger earnings on various portions of its system, but in preparing these figures it charged to passenger traffic the entire operating expenses of the line. In the city of Steubenville, during the year 1920, the passenger earnings, less operating expenses, were $20,821.65 on the interurban line, $3,759.57 on the Fourth Street line, and $4,216.18 on the La Belle View line; a total of $28,797.40. Between Fosterville and Costonia there was a deficit of $5,725.20, and south of the county line the interurban line earned an excess of $17,491.36 over operating costs. Between the State and county lines there was a deficit of $53,862.89, of which $38,757.42 was on the main line. The only branch line in the city of East Liverpool showing a profit was the Chester line. It earned a profit in Ohio of $5,107.75, and in West Virginia of $18,882. The total number of passengers handled on the entire line during the year 1920 was 10,720,707.

Evidence offered by the Ohio municipalities shows that certain relief has been offered to the traction company, but that the company has refused to accept it. The traction company shows that whatever relief has been offered has always been accompanied with such further restrictions as to make its acceptance of doubtfull value; and that, as a result of the interlocking nature of the franchises and ordinances of the different municipalities, it is practically impossible to get them in agreement on any measure of relief.

It is contended by the municipalities (a) that jurisdiction does not lie in this commission to alter the fares fixed by ordinance or franchise; and (b) that the merger of electric railways originally performing purely intrastate and principally city street-car service into the present operating company does not change their original status. As to the latter contention, it is sufficient to say that whatever may have been the original service afforded by the respective railways at the time of the merger, the traction company now is carrying on much more than a street-railway business. In its interurban operations it now assumes the status of an electric railway, and as such it is engaged in interstate transportation.

As to the first contention: There is not encountered here the usual assumption on the part of the State of jurisdiction over such service, the State of Ohio not having withdrawn from municipalities the franchise privilege and power over highways. There is encountered, however, an exceptional assumption of extraterritorial jurisdiction by municipalities. While under the Omaha street-railway decision, Omaha & C. B. St. Ry. Co. v. Interstate Commerce Com-

mission, 230 U. S. 324, it may consistently be argued that this commission has no jurisdiction over a city street-car line and may not impose rates and conditions for local service other than those stipulated in a franchise, it is not seriously to be contended that the Federal Government in its efforts to maintain facilities of interstate communication and to prevent discrimination is to be prevented by municipalities which, in franchises involving the use of their local streets, assume to regulate the rates to be charged to and between other cities; and particularly when such franchises impose rates which, under present conditions, obviously are unjust and which menace maintenance of interstate transportation facilities and service.

We are not satisfied on this record that we are warranted in disturbing the intrastate basis of fares now in effect on petitioner's branch or city lines, nor are we convinced that the issuance of
21 transfers as now in effect intrastate is unreasonable in connection with fares for interstate travel, provided, however, that such transfers to the interurban line between Vanport and Steubenville, or to local cars operating between State Line and Woosters, should be valid for transportation over one zone only.

We are of opinion and find, subject to the reservations above noted with respect to the initial fares, fares on branch or city lines, and the issuance of transfers, that the interstate passenger fares of the traction company between Vanport and Sixth Street, Steubenville, and intermediate points, and designated as "through service rates" in its tariff I. C. C. No. 8, and the interstate passenger fares between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, as published in the traction company's tariff I. C. C. No. 8 among its list of rates designated "local service rates," are just and reasonable interestate fares for the respective services between those points; and that the maintenance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce over the traction company's lines in the State of Ohio and between points in the State of Ohio and points in the State of Pennsylvania; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the traction company under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger fares not less than the interstate passenger fares herein found reasonable; provided, however, that the fares herein authorized are for application in connection with through travel, irrespective of municipal limits, on the interurban operations of petitioner,

and nothing herein is to be construed as authorizing any change in the fares as now in effect on the traction company's line for transportation of passengers who begin and end their journey within the limits of any municipality.

An appropriate order will be entered.

COMMISSIONERS AITCHISON, EASTMAN, POTTER, AND CAMPBELL dissent.

22 Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November, A. D. 1921.

No. 12092.

Ohio and Pennsylvania rates, fares, and charges.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the Steubenville, East Liverpool & Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future.

It is further ordered, that this order shall take effect on or before January 6, 1922, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY, *Secretary.*

23 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

Filed Dec. 29, 1921.

United States of America, by its counsel, now comes and moves the court to dismiss the bill of equity filed against it in the above-entitled cause.

As grounds for this motion it is shown—

1. The plaintiff is without interest in the controversy and has no standing in this court to maintain the bill.

2. The bill is without equity on its face and does not state any cause of action against the United States.

Wherefore, defendant prays that its motion be sustained.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. S. WERTZ,
United States Attorney.

24 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Motion to dismiss.

Filed Dec. 29, 1921.

The defendant, The Steubenville, East Liverpool, and Beaver Valley Traction Company, by its counsel, now moves this honorable court that the bill in equity herein be dismissed for the reason that the same on its face is without equity in the premises and states no cause of action against this defendant.

Wherefore, the defendant, The Steubenville, East Liverpool, and Beaver Valley Traction Company, prays that the bill be dismissed.

AGNEW HICE, TOLLES, HOOSETT, GINN & MORLEY,
Counsel for The Steubenville, East Liverpool, and Beaver Valley Traction Company.

25 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of the Interstate Commerce Commission.

Filed Dec. 29, 1921.

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of

exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering the allegations contained in the bill of complaint, this intervening defendant, which for convenience will be referred to hereinafter as the commission, admits and alleges that defendant The Steubenville, East Liverpool and Beaver Valley Traction Company is a common carrier by railroad engaged in the transportation of passengers and property from points in one State to points in another State; that, upon petition by said defendant alleging that the observance by it of various franchise ordinances and regulations imposed by the authority of the States of Ohio and Pennsylvania causes and results in undue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce, and results in unjust
26 and unreasonable discrimination against interstate commerce, the commission, on January 10, 1921, instituted an investigation, docketed as No. 12092, to determine, among other things—

* * * the reasonableness of petitioner's interstate rates, fares, and charges as shown in said I. C. C. No. 8, and whether the rates, fares, and charges required by authority of the States of Ohio and Pennsylvania to be maintained by said petitioner cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce * * *.

The commission further alleges that copies of the order of investigation and of the notice assigning the case for hearing were sent, by registered mail, among others, to the Governor of Ohio, the Governor of Pennsylvania, the Public Service Commission of Pennsylvania, the Public Utilities Commission of Ohio, and to the mayors of East Liverpool, Ohio, Wellsville, Ohio, Toronto, Ohio, Steubenville, Ohio, Glasgow, Pa., and the county clerk, County of Columbiana, Lisbon, Ohio; that the full hearing provided for in section 13 of the interstate commerce act was accorded to all interested parties; that at said hearing a large volume of testimony and other evidence, bearing upon the matters under investigation, was submitted to the commission for consideration; that subsequently the questions presented for decision were fully argued, both orally and in briefs, and the matters and things involved in said case were submitted to the commission for determination, whereupon, on November 7, 1921, the commission determined said questions and made its report, findings, and order in said docket No. 12092, Ohio and Pennsylvania Rates, Fares, and Charges, 64 I. C. C. 517, which

are attached hereto, marked Exhibit A, and are hereby referred to and made a part hereof.

The commission further alleges that said findings were and are and each of them was and is, fully supported and justified by the record before the commission in said proceeding.

The commission further alleges that in making said report,
27 findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making them it did not exceed the authority which was duly conferred upon it, or exercise that authority in an unreasonable manner.

II.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the bill herein in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact included in the commission's said report, findings, and order.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By WALTER MCFARLAND, *Counsel.*

P. J. Farrell.
(Signed) P. J. FARREL,
Of Counsel.

[Affidavit of C. C. McChord to above paper omitted in printing.]

28 EXHIBIT A to Answer.

[Omitted, printed side p. 13.]

41 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Answer of The Steubenville, East Liverpool and Beaver Valley Traction Company.

Filed Jan. 12, 1922.

For answer to the bill of complaint in this case, this defendant, The Steubenville, East Liverpool and Beaver Valley Traction Company, says:

First. It is admitted that the city of Wellsville, Ohio, is a municipal corporation duly organized under the laws of the State of Ohio, and that the same is located in territory under the jurisdiction of the court in which this suit is pending.

Second. It is admitted that The Steubenville, East Liverpool and Beaver Valley Traction Company is a corporation duly organized under the laws of Ohio, but it is also averred that it is a corporation duly organized and existing under the laws of the State of Pennsylvania, and that the same was formed by the lawful merger under the laws of Ohio and the laws of Pennsylvania of three corporations, to-wit: The Steubenville, East Liverpool Railway and Light Company, The East Liverpool Traction and Light Company, both of which were corporations of the State of Ohio, and The Ohio River Passenger Railway Company, a corporation of the State of Pennsylvania, and it is admitted that The Steubenville, East Liverpool and Beaver Valley Traction Company is a common carrier of passengers for hire, but it is averred that it is also a common carrier of light freights, and it is further averred that it is
42 such carrier of passengers and freights both intrastate in the States of Pennsylvania, Ohio, and West Virginia, and also interstate between the aforesaid States of Ohio, Pennsylvania, and West Virginia.

Third. It is admitted that the United States of America is made defendant in this action by and under authority of certain provisions of the statutes of the United States of America.

Fourth. It is denied that the defendant, the traction company above named, owns and operates an electric street railway from the western boundary line of the city of Wellsville, Ohio, to the eastern boundary line of the city of East Liverpool, Ohio, a distance of about ten miles, all of which lines operate over and upon the streets of East Liverpool and Wellsville, Ohio, but it is averred that the defendant, the traction company above named, owns and operates as a part of its interurban interstate electric railway an electric railway operating from the western boundary line of the city of Wellsville to the eastern boundary line of the city of East Liverpool, which is a distance of about eleven miles, and that its line between said points is operated over and upon certain streets in the city of East Liverpool and certain streets in the city of Wellsville, and upon a certain public road in East Liverpool Township not within the corporate limits of either of said cities and also upon certain private rights of way within the city of East Liverpool; and also within the township of East Liverpool, and not within the limits of either of said cities.

Fifth. It is denied that the distance from the business center of Wellsville, Ohio, to the business center of East Liverpool, Ohio, is a distance of about four miles, and that all of its right of way is paved except the part owned by defendant for a private right of way. A part of this right of way is over the country road
43 leading from Wellsville to East Liverpool; that the greater part of the inhabitants of the city of Wellsville and East

Liverpool are carried each day over the lines of said traction company to their work in factories or stores located in the other city, and are carried to and from their work on the lines of the said defendant, the traction company above named, and all the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependent upon the said street car line for transportation, but it is averred that the distance from the business center of the city of Wellsville to the business center of the city of East Liverpool is about six miles, and that a part of said distance where said tracks are located upon public highways is paved, and it is further averred that there is no pavment upon the private rights of way owned by said traction company, and it is admitted that for a part of the aforesaid distance said traction company's line is over the county road leading from Wellsville to East Liverpool, but it is averred that some part of the inhabitants of the city of Wellsville and of the city of East Liverpool, but by no means the greater part of said inhabitants, are carried each day over the lines of said traction company to their work, and it is further averred that there is a considerable number of inhabitants of each city who are employed in factories or stores located in the other city, and that some of such inhabitants are carried to and from their work on the lines of this defendant, and it is averred that the inhabitants of both Wellsville and East Liverpool and the suburbs of said cities are dependent upon said interurban interstate electric railway for transportation to the extent to which they may require such transportation.

Sixth. This defendant denies the allegation made in said bill of complaint that the line of said street railway was first constructed and operated in the year 1892, and in order to construct said
44 lines Albert M. Johnson, Sidney H. Short and C. E. Grover applied to the council of the city of Wellsville, Ohio, for a franchise to construct such line over the streets of said city, and denies that on September 14, 1891, at their request the council of the city of Wellsville, Ohio, duly adopted an ordinance, which ordinance was duly accepted by the said plaintiff, and denies by the terms of said ordinance said parties and their legal successors in title were given the right to construct, maintain, and operate for a period of twenty-five years an electrical street railway over certain streets in said city, and denies that said ordinance further provided that a fare of five cents should be charged for each passenger over the whole or any part of said railway or any extension of the same, and that said franchise ordinance further provided that said grantees should place good and sufficient cars upon said line and run them as often and at such rate of speed as public convenience may demand or as council of said city might require.

And it is further denied that to extend said railway over the streets and roads of Wellsville to and through the streets of East Liverpool, said Johnson, Short, and Grover obtained, at about the date of said franchise from the city of Wellsville, a franchise from the county

commissioners of Columbiana County to construct said railway from the easterly corporation line of Wellsville to the westerly corporation line of East Liverpool, and it is denied that they also on or about said date obtained a franchise from the council of the city of East Liverpool, Ohio, giving them and their successors and assigns the right to construct an electric street car line from the westerly corporation limit of said city to the easterly corporation line thereof and to use the streets of said city for such purpose, but it is averred that the line of railway of this defendant referred to in said bill of complaint as extending from the westerly corporation line of the city of Wellsville to the easterly corporation line of the city of East Liverpool was not built in the year 1892, and it is further

45 averred that upon application of Albert M. Johnson, Sidney H. Short, and C. E. Grover certain rights were obtained from the city of Wellsville for the construction and operation of an electric railway on certain streets in said city of Wellsville, and that subsequently the said persons or their successors at various and divers times obtained additional rights by ordnance from the city of Wellsville and by resolution from the county commissioners of the county of Columbiana, and by ordinance from the city of East Liverpool under which and in pursuance of which this defendant now operates its electric railway from the western corporation limit of the city of Wellsville to the eastern corporation limit of the city of East Liverpool, which electric railway is a part of the main line of the electric railway of this defendant which extends from Sixth Street in the city of Steubenville in the county of Jefferson and State of Ohio to a point called Vanport in Borough Township in the county of Beaver and State of Pennsylvania, a distance of 40.2 miles, and it is admitted that the franchise ordinances of said city of Wellsville and of the city of East Liverpool and the resolutions of the Board of County Comissioners of the County of Columbiana fixed a fare of five cents to be charged for each passenger being carried over said railway of defendant from the western corporation line of Wellsville to the eastern corporation line of East Liverpool or any part thereof, but it is averred that other portions of the street railway system of the defendant within the limits of the city of East Liverpool, namely, the river line, the Pleasant Heights line, and the Grandview line, as well also the line extending from the city of East Liverpool to the city of Chester in the county of Hancock and State of West Virginia, were constructed in pursuance of rights granted by other ordinances of the city of East Liverpool.

Seventh. It is denied that in pursuance of said franchise so

46 obtained from the said cities of Wellsville and East Liverpool and the county commissioners of Columbiana County the said Johnson, Grover, and Short built and operated an electric street car line over and through said cities and over said public road, if it is thereby meant that the road built by said Johnson, Grover, and Short was coextensive with and located as the line of this defendant from

the westerly corporation line of Wellsville to the easterly corporation line of East Liverpool is now located and operated.

Eighth. It is admitted that in pursuance of the ordinances and franchises granted by the city of Wellsville and the city of East Liverpool the rate of fare for each passenger over the entire route or any part thereof was fixed at five cents, but as to whether before the construction of said street railway the grantees accepted the provisions of said ordinance in writing or not is unknown to this defendant and is therefore denied, and if material to the issues tendered by the bill proof therof is demanded.

Ninth. It is admitted that at some time, but whether on the 19th day of November, 1901, or not this defendant has no knowledge, the rights of the said Johnson, Grover and Short became vested in the East Liverpool Railway Company, and that the city of Wellsville passed an ordinance granting to the last named company the right to construct, maintain, and operate an electric railway on the streets of said city from Eighteenth Street to the southern line of Clark Avenue in the said city, and it is admitted that one of the provisions of said ordinance was that said grant should be for a period of twenty-five years and the rate of fare should be five cents for each passenger carried over the line as operated in the said cities of Wellsville and East Liverpool, and between said cities or on any extension thereof, and that said ordinance stipulated that said company should run good cars as often as required for public convenience or by the city council, and it is admitted that said
47 franchises provided that the rights granted to Johnson, Grover and Short and all the terms of said ordnances granting such rights should become apart of the ordinance granting rights to said corporation last named, but whether said ordinance was by said company accepted in writing is unknown to this defendant, and is therefore denied, and should the same be deemed material to the issues tendered by the bill proof thereof is demanded, and it is admitted that under the last mentioned ordinance the said East Liverpool Railway Company extended its lines.

Tenth. It is admitted that the council of the city of Wellsville on the 19th day of September, 1905, passed Ordinance No. 594 and extend the franchises granted thereby for a period of twenty-five years, and that said ordinance provided that the rate of fare over the entire line from the western limits of the city of Wellsville to the eastern limits of the city of East Liverpool should be five cents for each passenger, but whether said ordinance was accepted in writing this defendant has no knowledge and therefore denies the same, and if such written acceptance is deemed material for the issues tendered by the bill proof thereof is demanded.

Eleventh. It is denied that on the day of , 1916, this defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company, purchased or acquired all the rights and property and franchises of the East Liverpool Railway Company in the cities of Wellsville and East Liverpool and from the county commis-

sioners of Columbiana County, and it is denied that in the year 1905 this defendant built an interurban line of electric railway from Steubenville, Ohio, to the western corporation line of Wellsville, Ohio, where it connected with the line of railway operated under said franchises from Wellsville to the easterly line of East Liverpool, Ohio, but it is admitted that the cars operated by this defendant from Steubenville, Ohio, to East Liverpool, Ohio, are the same cars
48 operated over streets within the cities of Wellsville and East Liverpool and are operated under ordinances passed by said cities or some of them.

Twelfth. It is denied that in the year 1905 or at any other time the Beaver Valley Traction Company built a line of electric railway from Beaver in the State of Pennsylvania to the easterly corporation line of East Liverpool, Ohio, and ran its interurban cars by electricity from the eastern corporation line of East Liverpool, Ohio, over the tracks of the East Liverpool Railway Company, and denies that the East Liverpool Traction and Light Company owned by the East Liverpool Railway Company, and said East Liverpool Traction and Light Company in 1905 operated its line from the eastern limits of East Liverpool to the western limits of Wellsville, Ohio, and denies that said three companies continued so to operate over their respective lines until the defendant, the traction company, about the year 1916 acquired by merger all three of said lines, and it is denied that on the day of , 1916, this defendant by said merger acquired the control and use of said car lines and said franchises in and between the cities of East Liverpool and Wellsville, Ohio, and has since said date operated the same under said franchises, and denies that said defendant has no other franchises or right so to occupy the streets of said cities or the highway between said cities except such right as is granted in and by said franchise ordinance of said cities and said county commissioners.

It is admitted that the last grant made by the city of Wellsville, Ohio, and accepted by the predecessors in title or some of them to this defendant and now owned by this defendant was granted by the council of said city of Wellsville, September 19th, 1905, being Ordinance 594, and that said ordinance provides in Section II thereof

"That it is one of the conditions of this ordinance and one of the conditions of this grant for the use of said streets for a double track that grantee or its successors shall charge for a fare
49 the sum of five cents for each passenger carried over the entire route from the western corporation line of Wellsville to the State line between Ohio and Pennsylvania or any part thereof, but policemen and regularly paid firemen of said city, when in uniform, shall be carried free."

And it is averred that the Steubenville, East Liverpool and Beaver Valley Traction Company was created on the 1st day of November, 1917, by the lawful merger under the laws of the States

of Ohio and Pennsylvania of three corporations, namely: The Steubenville and East Liverpool Railway and Light Company, the East Liverpool Traction and Light Company, both being corporations of the State of Ohio, and the Ohio River Passenger Railway Company, a corporation of the State of Pennsylvania, and it is further averred that by virtue of said merger all of the electric railways and properties of said three corporations and their corporate franchises and municipal grants and rights became vested in and the property of said merged corporation, the Steubenville, East Liverpool and Beaver Valley Traction Company.

Thirteenth. It is admitted that the easterly corporation line of the city of East Liverpool is the State line between the States of Ohio and Pennsylvania.

Fourteenth. Answering the averment of the bill of complaint that "by the laws of Ohio any such traction company is forbidden to charge any greater rate of fare than that stipulated in any such franchise ordinance so passed by the proper authority of a city or county and duly accepted by any such traction company," this defendant avers that it is asserting its rights herein under the acts of Congress of the United States providing for the regulation of interstate commerce and by virtue of the orders of the Interstate Commerce Commission of the United States made in pursuance thereof, any laws of the State of Ohio to the contrary notwithstanding.

Fifteenth. Defendant denies the averments of said bill that on or about April 12, 1921, it filed an application before the Interstate Commerce Commission, but avers that on or about
50 the day of , 1920, it filed its petition with the Interstate Commerce Commission, which was entered as number 12092 on the docket of said commission, copy of which petition is hereto attached, marked Exhibit "A" and made a part hereof, and further avers that after notice to plaintiff and full hearing said commission upon due consideration made and entered its report and order in the premises on the 2nd day of November, 1920, copy of which report and order is hereto attached, marked Exhibit "A" and made a part hereof.

Sixteenth. This defendant denies the averment contained in the bill of complaint, which reads as follows:

"This plaintiff avers that the said act of Congress, known as the transportation act of 1920, does not confer or grant nor purport to confer or grant the authority claimed by these defendants, but if it does purport to grant such authority then and in that event the plaintiff avers that said transportation act in so far as it attempts to confer such authority is unconstitutional, void, and unenforceable, because it would in that event deprive the State of Ohio of its police power expressly reserved to it by article 10 of the Constitution of the United States and would deprive the plaintiff and its citizens of property without due process of law and would deprive plaintiff of its right to enter into a franchise contract with any

corporation and would set aside valid and binding contracts without due process of law."

Seventeenth. The averments of the plaintiff, to wit:

"Plaintiff and its officers and employees in the discharge of their duties are obliged to and do travel over the lines of said traction company as passengers and the fares charged therefor by said traction company, defendant herein, are paid by plaintiff from public funds, and that is the increased rated which defendants are to put into effect as herein complained of are charged such officers and employees, such increase will be paid by plaintiff and its public funds are thus used and lost."

are not within the knowledge of this defendant and are therefore denied by it, and if the same are material to the issues tendered by the bill this defendant demands that proof thereof be made, but avers that if such officers and employees do so travel they will be required to pay the lawful fare, and it is denied that the funds so paid will be lost.

Eighteenth. The averments of the plaintiff, to wit:

51 "That the city of Wellsville, Ohio, has a population of about nine thousand and the city of East Liverpool has a population of about twenty-five thousand, and that there are about fifteen thousand persons in the territory surrounding said cities, all of whom are dependent upon the lines of said traction company for transportation and all of whom do use said lines."

are not within the knowledge of this defendant and are denied, and if material to the issues of the bill proof thereof is demanded.

Nineteenth. This defendant denies the allegations of the plaintiff's bill, to wit:

"That said defendants are threatening to and will, unless restrained by this court, put into operation in Ohio and on the lines of said street railway rates and fares far in excess of the lawful rates and fares for the transportation of persons and property within the State; that during the year 1920, 3,227,652 persons were so carried over said line, all of whom paid fare as passengers, and there are at least that many persons that still use said lines as passengers, and if compelled to pay such rate of fares as proposed the people of the State of Ohio and of said cities and its suburban territory will be deprived of thousands of dollars in value and of their rights without due process of law, which will result in great disorder from resistance to such rate so proposed, and in a multiplicity of suits both criminal and civil, and will ignore and deprive the State of its constitutional powers and of its police power to its irreparable damage, and will result in the taking away of the right of plaintiff to enforce its valid contracts, to the irreparable damage to the State of Ohio and to plaintiff and said State and plaintiff, and the citizens so affected are without any adequate remedy at law."

and this defendant avers that the order of the Interstate Commerce Commission hereinbefore set forth was put into effect and operation on the 25th day of December, 1921, and that there occurred no disorder or resistance whatever and that no suits, either criminal or civil, have been instituted with respect thereto (saving always the bill in equity, to which this answer is now filed).

Wherefore this defendant prays that it may go hence and recover its costs herein expended.

THE STEUBENVILLE, EAST LIVE'POOL AND BEAVER VALLEY TRACTION COMPANY,
By J. H. MAXWELL, *President.*

52 [Affidavit of J. H. Maxwell to above paper omitted in printing.]

53 *Exhibit "A" to foregoing answer.*

Before the Interstate Commerce Commission.

Docket No. ——.

In the matter of rates, fares, and charges of the Steubenville, East Liverpool & Beaver Valley Traction Company within the States of Ohio and Pennsylvania.

To the Honorable Interstate Commerce Commission:

The petition of the Steubenville, East Liverpool & Beaver Valley Traction Company respectfully shows:

I.

That the Steubenville, East Liverpool & Beaver Valley Traction Company is a corporation of the States of Ohio and Pennsylvania, having its principal office in the State of Ohio, in the city of East Liverpool, in the county of Columbiana, in said State, and its principal office in the State of Pennsylvania, in the Borough of Midland, county of Beaver, in said State, which said The Steubenville, East Liverpool and Beaver Valley Traction Company was formed by the lawful merger under the laws of the States of Ohio and Pennsylvania of the properties, rights, and franchises of the Steubenville and East Liverpool Railway and Light Company, the East Liverpool Traction and Light Company (both of said corporations being corporations of the State of Ohio), and the Ohio River Passenger Railway Company (a corporation of the State of Pennsylvania), said traction company being also legally authorized to carry on business in the State of West Virginia, and is a common carrier engaged in interstate and intrastate transportation of passengers and property and as such common carrier is subject to the act to regulate commerce approved February 4, 1887, and of the acts amenda-

54 tory thereof and supplementary thereto.

II.

That the Steubenville, East Liverpool and Beaver Valley Traction Company owns and operates an interstate electric railway extending from a point in the township of Borough, in the county of Beaver, and State of Pennsylvania, commonly called Vanport, to a point on Market Street, in the city of Steubenville, county of Jefferson, and State of Ohio, with a branch extending from a point in the city of East Liverpool, State of Ohio, commonly called the diamond to the city of Chester, in the county of Hancock, and State of West Virginia. The route of said electric railway is more particularly described as follows: Beginning at the point called Vanport heretofore mentioned, extending westward through the township of Industry, the borough of Midland, the township of Ohio, the borough of Glasgow, and again the township of Ohio to the Ohio and Pennsylvania State line, said route being practically parallel with the Ohio River, and from the Ohio-Pennsylvania State line, which is also the line of the city of East Liverpool, through the city of East Liverpool, the township of Liverpool, the city of Wellsville, all in the county of Columbiana and State of Ohio, to the line of the county of Jefferson in said State of Ohio, the route of said line from Pennsylvania State line to the Jefferson County line being substantially parallel with the Ohio River, and from the Jefferson County line aforesaid through Saline Township, Knox Township, the village of Empire, the city of Toronto, Island Creek Township, and the city of Steubenville, all in the county of Jefferson, aforesaid, the route in the county of Jefferson being substantially parallel with the Ohio River, and also a branch line extending from a point in the city of East Liverpool, formerly referred to as the diamond, and crossing the Ohio River upon a bridge to the city of Chester in the county of Hancock and State of West Virginia, and through said city substantially parallel with the Ohio River. In addition to the
55 main lines above described, the Steubenville, East Liverpool and Beaver Valley Traction Company has three branch lines in the city of East Liverpool, one known as the river line and running along the Ohio River, one known as the Pleasant Heights line, and another known as the Grandview line, both of the last mentioned lines being extensions northward in said city of East Liverpool, and the said The Steubenville, East Liverpool and Beaver Valley Traction Company has also two branch lines in the city of Steubenville, one known as the La Belleview line and the other as the Fourth Street line. The lines thus described comprise about 100 track miles. The main line from Vanport to Steubenville is 40.2 miles in length, and the main line from East Liverpool to Chester is 2.5 miles in length; the said main line from Vanport to Steubenville and the said Chester branch are double track railways.

Much of the lines of said electric railway in the States of Pennsylvania, Ohio, and West Virginia is constructed upon private rights of way, but in the cities and villages traverses public high-

ways or streets, and the line to Chester crosses the Ohio River on a steel suspension bridge about one-third mile in length, which is owned by said traction company.

The said electric railway is operated by power purchased from the Buckeye Power Company, a corporation of the State of Ohio.

The said electric railway has at East Liverpool and at Steubenville sufficient car barns, machine shops and repair shops, and the necessary offices, and the said railway is equipped with cars sufficient to provide for its operation for the accommodation of the public for interstate as well as intrastate traffic. That the various cities, villages, and counties of the State of Ohio mentioned herein are duly organized and constituted under the constitution and laws of the said State of Pennsylvania.

III.

56 Your petitioner further represents that the value of its property devoted to its transportation service and used and useful therein exceeds six and one-half million dollars ($6,500,000); that it has an authorized issue of first mortgage thirty year five per cent sinking fund gold bonds in the amount of $3,000,000, $1,483,000 in which have been issued and are outstanding its common capital stock to the amount of $2,000,000 par value and five per cent cumulative preferred stock to the amount of $2,600,000 par value.

IV.

The railway of the Steubenville, East Liverpool and Beaver Valley Traction Company in the State of Pennsylvania has been constructed, and is operated by virtue of its corporate franchises granted by the State of Pennsylvania, and also by virtue of the consents of the various townships and boroughs through which it passes, which townships and borroughs with the exception of the borough of Glasgow have not undertaken to impose upon said Electric Railway any regulations with respect to fares and rates to be charged. The borough of Glasgow has, however, imposed a limitation upon the fares to be charged, so that no more than five cents can be charged between the borough of Glasgow and the Ohio State line, or between the borough of Glasgow and the western boundary of Industry Township (now Eighth Street in the borough of Midland).

Your petitioner is advised that the Public Service Commission of the State of Pennsylvania has jurisdiction and power to control the intrastate rates to be charged by said electric railway in the State of Pennsylvania, including within its said control and jurisdiction the territory embraced or attempted to be embraced within the fare regulations of said borough of Glasgow.

Within the State of Ohio the said electric railway is operated to a large extent under certain franchise ordinances granted by certain

cities, counties, and villages through which said electric railway passes.

57 That the cities of East Liverpool and Wellsville and the county of Columbiana have attempted to and do *em*pose fare regulations upon said railway by which said railway is required to transport passengers from the Ohio-Pennsylvania State line to the line of Jefferson County, Ohio, a distance of eleven miles, for the sum of five cents. That the city of Toronto by its franchise ordinance has imposed upon said electric railway fare regulations by which it is required to carry passengers from a place called Fostersville to a place called Costonia, a distance of 4.2 miles, for five cents or by the purchase of tickets at the following rates: Thirteen tickets for fifty cents, or three and eight hundred forty-six thousandths cents.

The city of Steubenville by its franchise ordinance imposed regulations upon said electric railway by which its fares within the city are limited to five cents, or six tickets for twenty-five cents, with transfers, which fares, however, have been modified for a period of two years by an ordinance adopted on the eighth day of April, 1919, so that the fare during said period of two years is six cents, or nine tickets for fifty cents, with transfer.

V.

Your petitioner avers that since the formation of the Steubenville, East Liverpool and Beaver Valley Traction Company on the first of November, 1917, the labor cost for operation of the electric railway has increased substantially one hundred per cent, and the cost for materials and supplies has increased substantially from one hundred to two hundred per cent.

VI.

That on the first day of November, 1917, the Steubenville, East Liverpool and Beaver Valley Traction Company, obtained its power at a cost of seven mills per kw. h. from the Buckeye Power Company, since which time said power company has filed with the

58 Public Utilities Commission of Ohio rates greatly in excess of said seven mills per kw. h.

VII.

Your petitioner avers that the Public Utilities Commission of the State of Ohio is without power to regulate the fares to be charged by said traction company in the State of Ohio in all those districts where cities, counties, or villages have regulations with respect to fares, and that as a result there is but a small part of the lines of said traction company in the State of Ohio subject to the jurisdiction and control of the Public Utilities Commission of Ohio with

respect to fares, but to the extent of its jurisdiction said utilities commission has permitted fares to become effective which are indentical with the fares set forth in tariff I. C. C. No. 8 hereinafter referred to.

VIII.

That on the tenth day of September, 1920, the Steubenville, East Liverpool and Beaver Valley Traction Company put into effect its interstate tariff I. C. C. No. 8, and also filed with the Public Utilities Commission of the State of Ohio a tariff increasing the rates over those parts of the traction company's lines where there were no ordinance regulations created by cities and villages with respect to fares. The rates in the tariff so filed with the Public Utilities Commission of the State of Ohio are identical with the rates set forth in I. C. C. No. 8, except upon those portions of the lines within the control of the franchise ordinances of the cities, counties, and villages as hereinbefore mentioned, and the said tariff so filed with the Public Utilities Commission of Ohio is now effective.

IX.

That prior to the tenth day of September, 1920, said traction company filed with the Public Service Commission of Pennsylvania a tariff for intrastate rates in the State of Pennsylvania identical with the rates in said tariff I. C. C. No. 8, and the same has
59 become effective, but objections thereto have been filed by the borough of Glasgow, and the matters growing out of such objections are now pending before the Public Service Commission of Pennsylvania.

X.

That in those parts of the State of Ohio wherein the rates are controlled by the so-called franchise ordinances of cities, counties, and villages the intrastate rates are very much less than the interstate rates for the same service over the same tracks.

Thus the fare from the Ohio-Pennsylvania State line to the Jefferson County line, a distance of eleven miles, is five cents in intrastate traffic, while in interstate traffic the fare is twenty-five cents; again the fare from suspension bridge to Jefferson County line in intrastate traffic is ten cents, while the fare over the same tracks in interstate traffic is twenty-five cents; again, the fare from Costonia to Fostersville, a distance of four and two-tenths miles, is in intrastate traffic five cents, or by the purchase of tickets less than four cents, whereas in interstate traffic the same service over the same rails is fifteen cents.

So also the rate from Sixth Street, Steubenville, to the city limit of Steubenville in interstate traffic is ten cents, while in intrastate traffic the rate is five cents, or six tickets for twenty-five cents, with

transfer, or under the two-year ordinance hereinabove referred to, is six cents or nine tickets for fifty cents, with transfer; again, from Crawford Avenue to McNeil Corner in interstate traffic is eight cents, and intrastate traffic is five cents, or six tickets for twenty-five cents, with transfer, and under the said two-year ordinance is six cents, or nine tickets for fifty cents, with transfer; again, from Crawford Avenue to Wellsley Avenue in interstate traffic is sixteen cents, and in intrastate traffic is five cents, and six tickets for twenty-cents, with transfer, or under said two-year ordinance is six cents, or nine tickets for fifty cents, with transfer.

60 So also on the side lines in the city of East Liverpool, the rate in interstate traffic is eight cents without transfer, while in intrastate traffic the rate is five cents with transfer.

XI.

Your petitioner further represents that the rates and charges fixed by said ordinances do not and will not yield sufficient revenue to pay the cost of operating its railway in rendering the service for which said rates and charges are paid, and are therefore unjust, unreasonable, and confiscatory and constitutes an undue discrimination against and injuriously affects interstate commerce; that while it has a large volume of traffic, both passenger and freight, and both interstate, its revenues derived from the operation under said ordinances and said tariffs, State and interstate, are and will be insufficient to pay its operating expenses including taxes and the cost of maintaining its property engaged in said service, without any return on the value of its property devoted to said service; that its bond interest is in default for more than one year, and that the costs of the operation of said railway are continually increasing.

Your petitioner further represents that rates and charges for its interstate service high enough to provide additional revenue sufficient to pay the operating costs, taxes, and maintenance of its said railway without an increase of the rates and charges for its said intrastate service would but serve to increase and accentuate the present undue, unreasonable, and unjust burden upon and discrimination against interstate commerce and add to the present undue and unreasonable advantages and preferences in favor of persons and localities using said carrier in intrastate commerce.

XII.

Your petitioner further represents that to continue said intrastate rates fixed by the ordinances aforesaid will seriously impair

61 and in time wholly destroy the ability of your petitioner to continue said railway as a going concern engaged in interstate commerce and will deprive the public which it serves of the in-

terstate transportation facilities now and ever since November, 1917, furnished by your petitioner.

XIII.

Your petitioner avers that if its rates for intrastate traffic were the same as its rates for interstate traffic under said tariff I. C. C. No. 8, the income of your petitioner would be sufficient to pay its expenses for operation, maintenance, and taxes, and a sufficient amount in addition to pay a return upon its invested capital to the extent of its bonded indebtedness.

Wherefore your petitioner prays that appropriate notice of the pendency and prayer of this petition be given; that your honorable commission take note of the urgent necessities of your petitioner and hat you institute at an early date an investigation with respect to the matters and things herein set forth; that your petitioner may have such order or orders in the premises as may be just and reasonable to the end that the unjust and unreasonable discriminations complained of may be removed by causing said cities, counties, and villages to cease and desist from enforcing the restrictions upon rates and charges now imposed by them and each of them and that only such rates and fares be charged by your petitioner as your honorable commission may find and determine just and reasonable and free from unjust discrimination, and that your petitioner may have such other order or orders to which it may be found entitled.

Respectfully submitted.

THE STEUBENVILLE EAST LIVERPOOL AND
BEAVER VALLEY TRACTION COMPANY,
By J. H. MAXWELL, *President.*

East Liverpool, Ohio, 1920.

Attest by
62 GEO. H. FAULK,
Secretary.

AGNEW HICE,
Beaver, Pa., Attorney.

T. H. HOGSETT, Cleveland, and
C. R. MARSHALL, Washington,
Of Counsel.

63 *Exhibit "B" to foregoing answer.*

[Omitted, printed side p. 13.]

77 [File endorsement omitted.]

In the District Court of the United States, Northern District of Ohio, Eastern Division.

[Title omitted.]

Notice on motion for injunction.

Filed Dec. 16, 1921.

The defendants will take notice that on the 29th day of December, 1921, at 9.30 a. m., the plaintiff The City of Wellsville, Ohio, will apply to the court for a temporary injunction.

CHARLES BOYD,
City Solicitor of Wellsville, Ohio.

78 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Opinion of court filed and entered March 13, 1922, by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

WESTENHAVER, District Judge:

This suit is the counterpart of the Village of Hubbard vs. The United States et al., this day decided. It was heard, argued, and submitted at the same time, and involves substantially similar facts and precisely the same questions of law. These questions likewise arise upon plaintiff's application for a preliminary injunction and upon motion of defendants, the United States and the Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss, and upon answer to the merits filed by the Interstate Commerce Commission setting up its order and its findings of fact. The same conclusion and judgment is required.

The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found, is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger
79 and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant, than in

the Village of Hubbard case. In the company's annual reports its gross receipts from these freight earnings are reported under express earnings. The company is not, in our opinion, subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in our opinion in the Village of Hubbard case.

The motion to dismiss will be denied. A preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

80 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Opinion referred to in preceding opinion of court filed and entered March 13, 1922, by Maurice H. Donahue, Circuit Judge, John M. Killits and D. C. Westenhaver, District Judges.

THE VILLAGE OF HUBBARD, OHIO, PLAINTIFF, vs. UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and The Pennsylvania-Ohio Power & Light Company, Defendants.	IN EQUITY No. 680.

Before Donahue, Circuit Judge, Killits and Westenhaver, District Judges.

WESTENHAVER, District Judge:

This suit is brought under the terms of the act of October 22, 1913 (U. S. Comp. Stat. 1916, sec. 998). Plaintiff seeks a preliminary injunction restraining the Pennsylvania-Ohio Power & Light Company from putting into effect an order of the Interstate Commerce Commission made November 7, 1921. This order requires that company to cease and desist from practicing a certain undue prejudice, preference, advantage, and unjust discrimination found by the commission to exist in the relation of intrastate and interstate passenger fares, and to establish, put in force, and maintain a certain schedule of passenger fares for the transportation of passengers in intrastate commerce between Hubbard, in the State of Ohio, and Youngstown, in the State of Ohio.

This cause has been heard, argued, and submitted upon plaintiff's application for a preliminary injunction; the motion of the defendants, the United States and the Pennsylvania-Ohio Power
81 & Light Company, to dismiss plaintiff's bill; and upon the merits as affecting plaintiff's right to relief, as they arise upon an answer filed by the Interstate Commerce Commission. The motion to dismiss is on two grounds: (1) that plaintiff is without

interest in the controversy and has no standing in this court to maintain its bill; (2) that the bill is without equity on its face and does not state a cause of action. The answer of the Interstate Commerce Commission sets up its findings of fact and its order, and contends that inasmuch as these findings are supported by substantial evidence, they are conclusive upon the court, and hence that the plaintiff is not entitled to any relief. On this hearing the full transcript of the proceedings and testimony taken by the Interstate Commerce Commission, in addition to its report and order, were introduced in evidence, and are considered in disposing of the several matters presented for consideration.

Plaintiff assails the validity of the Interstate Commerce Commission's order on several grounds, which, stated in our own language, reduce themselves to two: (1) That Congress has not conferred jurisdiction on the commission over an electric interurban railway company of the kind which the record shows the Pennsylvania-Ohio Power & Light Company to be, particularly over its purely intrastate transportation of passengers conducted under State and municipal franchise which are in legal effect binding contracts; (2) that the franchise granted by the village of Hubbard to the predecessor in title of the Pennsylvania-Ohio Power & Light Company, and duly accepted by it and binding as a contract on the present defendant, requires the transportation of passengers between Hubbard, Ohio, and Youngstown, Ohio, at a fixed rate of fares, which franchise contract cannot be impaired by an order of the Interstate Commerce Commission, and is, indeed, beyond the constitutional power of Congress itself to annul and impair. Such, in brief, are the respective contentions.

82 The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. In 1901 a franchise ordinance was passed by the village of Hubbard and accepted by the Youngstown & Sharon Railway Company, a corporation chartered as a street railway under the statutes of Ohio, to operate between Youngstown, Ohio, and Sharon, Pennsylvania. In 1917 this company was merged with four other Ohio corporations and one Pennsylvania corporation, under the name of The Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to The Pennsylvania-Ohio Electric Company. On November 21, 1920, a new corporation, the present defendant, The Pennsylvania-Ohio Power & Light Company, was organized to take over and operate the Youngstown-Sharon line. The line thus acquired by defendant, and now operated by it, extends from Youngstown, Ohio, only to the Ohio-Pennsylvania State line, and the defendant operates its cars from the State line into Sharon, Pennsylvania, a fractional part of a mile, over the tracks of the Shenango Valley Traction Company.

The maximum distance from Youngstown to Hubbard is 8.75 miles, and from Hubbard to Sharon is 7.18 miles. The franchise provides for the maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon of a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets good for 22 rides for $2.00, and 54-trip commutation tickets for $3.80. Effective February 15, 1920, this Mahoning & Shenango Railway & Light Company, then the owner and operator of defendant's line, by a tariff filed with the Interstate Commerce Commission, increased its one-way fare
83 between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between these points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, also filed with the Interstate Commerce Commission a tariff in which it proposed to establish the same rates of fare between Hubbard and Youngstown as those in effect between Hubbard and Sharon, as above stated, and also to increase and establish certain through fares between Sharon and Youngstown, being substantially the sum of the local fares. A tariff carrying these same fares was presented to, and rejected by, the Public Utilities Commission of Ohio in so far as it attempted to increase the fares between Hubbard and Youngstown, on the ground that this commission was without jurisdiction to allow and establish rates and charges in excess of those prescribed by franchise contracts. This seems to be the present state of the Ohio law. See Mahoning & Shenango Ry. & Light Co. v. Public Utilities Commission, 98 O. S. 303; Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 267; Toledo, Bowling Green & Southern Traction Co. v. Public Utilities Commission, 98 O. S. 305. In consequence of these complications the Pennsylvania-Ohio Power & Light Company filed its petition with the Interstate Commerce Commission complaining of the undue preference and discrimination existing between interstate and intrastate passenger fares, which, after notice and on hearing, resulted in the order above stated, which plaintiff is seeking to enjoin.

The Interstate Commerce Commission's findings of fact, it is settled law, are conclusive upon this court if supported by substantial evidence. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62. The commission's findings of fact in this situa-
84 tion are: That the interstate passenger cash and 54-ride commutation fares between Sharon and Hubbard, and also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable

interstate fares between Sharon and Hubbard has resulted, and will result, in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the State of Pennsylvania and between points in the State of Ohio and Sharon, Pennsylvania, in undue preference and advantage to persons traveling intrastate between points in Ohio, and in unjust discrimination against interstate commerce; also, that whether the passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can, and should, be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found to be reasonable as between Hubbard and Sharon. It is ordered that passenger fares between Hubbard, Ohio, and Youngstown, Ohio, shall be charged which shall not be less than 20 cents when paid in cash and $5.00 for 54 rides when a commutation ticket is purchased.

Plaintiff's contention that defendant's railroad is not that kind of a railroad engaged in interstate commerce or transportation which is made subject to the jurisdiction of the Interstate Commerce Commission, requires an inquiry as to whether the facts found in this respect by the Commision support its asumption of jurisdiction. Plaintiff contends that it is not engaged in the general business of transporting freight in addition to its passenger and express
85 business, and that it is not operated as a part of a general steam railroad system of transportation. The controversy before the commision involved nothing except passenger fares. In the commission's report it is said: "Petitioner is also engaged in the transportation of freight, as will be later explained." Later in the report the facts in this regard are stated. The defendant has two connections, one direct, and the other over a private siding at Masury and at stop 41, both between Hubbard, Ohio, and Sharon, Pa., with the New York Central Railroad. It does not originate and deliver freight traffic to the New York Central Railroad, but during the year 1919 and 1920, 922 cars of freight were received by it from that line for delivery chiefly at points on defendant's line. The defendant also operates a daily less-than-carload freight or parcel package service between Youngstown and Sharon, and on three days a week operates a through car for such service from Sharon in Pennsylvania to Newcastle, Pa. This through car, it will be noted, is loaded and operated wholly outside of the State of Ohio and is transported on a line not owned by defendant. In 1919 this less-than-carload freight amounted to 6,240 tons and produced a gross revenue of $18,000. The revenue from carload and switching services on cars received from the New York Central was $6,246.52. In 1920 the less-than-carload freight was 5,474 tons and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The passenger revenue receipts for 1920 were $332,173.43,

and an 1921 were $367,529.22. Thus it appears that the entire receipts from freight and switching services, including the carload freight from Sharon in Pennsylvania to Newcastle, Pennsylvania, are equal, substantially, to 7 per cent only of the entire gross earnings. Plaintiff asserts that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line, and that its less-than-
86 carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight traffic.

Upon these facts logically the first proposition of law to be considered is whether defendant's objection is sound, that the plaintiff is without interest in the controversy and has no standing in court. Neither in the oral argument nor in the briefs filed is this proposition given much consideration, and no authorities are cited supporting the contention. We assume this contention to be that the village of Hubbard in its corporate capacity has no such interest in the rights of passengers on defendant's railway, even though citizens and residents of the village of Hubbard, as will entitle it to maintain an action in their behalf, and that this case falls within the rules of law announced in Oklahoma v. A. T. & S. F. Ry. Co., 220 U. S. 277. In this case it was held that the State of Oklahoma might not sustain an original bill in the United States Supreme Court to enjoin undue discrimination against its citizens in favor of citizens of the State of Kansas. The principles of that case are not applicable. The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared, and was heard. Section 13, interstate commerce act, permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate or fare made or imposed by authority of any State. Obviously, therefore, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard, and if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the
87 commission. It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the commission and to be heard in court against its orders. See Judson on Interstate Commerce, 3rd Ed., sec. 437. In City of New York v. United States et all. (2 C. C. A.), 272 Fed. 768, a municipal corporation, the city of New York was the party plaintiff, and although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action.

Moreover, Ohio municipal corporations, when parties to a franchise contract, may be parties to actions to enjoin a violation or to

enforce the terms thereof. G. C., sec. 4311 and 4312; City of Springfield v. Springfield Gas Co., 12 C. C. (N. S.) 392, affirmed without report, 81 O. S. 537. No good reason is perceived why the plaintiff, as a party to a franchise contract injuriously affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights.

Defendant's objection that plaintiff's bill does not state a cause of action, and plaintiff's objection that the order of the Interstate Commerce Commission is void because defendant's electric street or interurban railway is not brought within the power and authority conferred by Congress on the commission, depend upon the same considerations, and will be considered together. Plaintiff's objection that the order of the commission, if within the apparent power thus conferred on the commission is none the less void because it invades the reserved power of a State over purely intrastate transportation or because it impairs the obligations of a franchise contract, depends upon separate and independent considerations. We shall consider these propositions in the reverse order.

In the view we take of this case it becomes unnecessary to
88 consider any question of constitutional power on the part of Congress. It is true that franchise grants, under the law of Ohio, are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. It is also true that a franchise of the kind under consideration, fixing the rate to control beyond the limits of the municipality granting it, is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it. See Interurban Railway & Terminal Co. v. City of Cincinnati, 93 O. S. 108; Interurban Railway Co. v. Public Utilities Commission, 98 O. S. 287; City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399. It may also be true that the principles of law announced in Houston & Texas Ry. Co. v. United States, 234 U. S. 343, known as the Shreveport case; American Express Co. v. Caldwell, 244 U. S. 617; Illinois Central Railway Co. v. Public Utilities Commission, 245 U. S. 493; and particularly in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., decided by the United States Supreme Court February 27, 1922, known as the Wisconsin passenger fare case, are not applicable to the precise situation here presented. However, we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention.

Plaintiff contends that upon the facts as found the Pennsylvania-Ohio Power &*B* Light Company is not a street electric passenger railway engaged in the general business of transporting freight in addition to its passenger and express business, nor a street or

suburban electric railway operated as a part of a general steam railroad system of transportation, nor an interurban electric railway operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight,
89 but, on the other hand, is a street or interurban electric railway of a different character and such as has not been made subject to the jurisdiction of the Interstate Commerce Commission.

Apparently, then, the question at issue comes down to one of power in the Interstate Commerce Commission, that is to say, the power and authority conferred on the commission by the interstate commerce act. That act does not, by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers, or all interstate commerce or traffic. It is limited to interstate commerce or transportation carried on by certain kinds of interstate carriers. Thus Mr. Justice Lamar, delivering the opinion in Omaha Street Railway v. Interstate Commerce Commission, 230 U. S. 324, 336, said: "When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." It was accordingly held that an electric street railway operating in and between Council Bluffs, Iowa, and Omaha, Nebraska, over a bridge across the Missouri River constructed for freight and passenger traffic under an act of Congress was not subject to the jurisdiction nor its rates within the control of the Interstate Commerce Commission. A careful examination, therefore, of the several provisions of the interstate commerce act becomes necessary.

From 1887 to 1906 the purview of the act was limited to commerce between the States carried by railroads. By the Hepburn Act of 1906 oil pipe-lines, express companies and sleeping car companies were brought within its scope. By the act of 1910 were added telegraph, telephone, and cable companies. The transportation act of 1920 leaves the provisions of the act as to the carriers subject to the jurisdiction of the commission as they were in these previous acts, but refers more frequently to street or suburban and interurban electric railways in order to exclude them from the purview of certain provisions and sections of the act.

90 Section 1 provides, among other things, as follows: "That the provisions of this act shall apply to common carriers engaged in (a) the transportation of passengers or property *wholly by railroad*, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * * but shall not apply (a) to the transportation of passengers or property or to the receiving, delivering, storage or handling of property *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid." The most material language of the provision above quoted are the words "wholly by railroad" and "transportation of passengers or property * * *

wholly within one State." This language was in section 1 of the act of 1887, and has been repeated in this section every time the section has been amended. This section was amended and re-enacted with this language in the transportation act of 1920, and must, in ascertaining the meaning of the act, be given equal weight and significance with new paragraphs 3 and 4 of amended section 13, so much relied on by defendants. For the purposes of this case our inquiry is limited to a determination of what are common carriers by railroad, and the further inquiry is, what is a railroad within the purview of this act? The definitions of "common carrier" and of "railroad" and of "transportation" in paragraph 3, section 1, transportation act, 1920, give no aid in answering these inquiries.

It was not until the amendments of June 18, 1910, that street electric railways are mentioned in the act. The authority previously conferred to establish through routes subject to the limitation "that no reasonable or satisfactory through routes exist" was by the 1910 amendment enlarged so that the commission might thereafter, whenever it deemed it necessary or desirable in the public interest, establish through routes without regard to existing routes. This
91 power, however, was limited by a provision in these words: "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character."

This language is ambiguous. Previous to its enactment, the Interstate Commerce Commission had assumed jurisdiction over electric street railways carrying passengers alone in numerous cases. See 7 I. C. C. 83; 13 I. C. C. 20; 20 I. C. C. 406; 20 I. C. C. 486. The provision above quoted, it was argued, was an indirect recognition that this jurisdiction was rightfully assumed and also a recognition by implication that electric street railways were railroads as defined in section 1, and were therefore subject to the jurisdiction of the commission. On the other hand, it was urged that this proviso was inserted out of an abundance of caution and to repel the implication that the word "railroad" as used in section 1 did include street electric railways as well as railroads well known highways of interstate commerce as understood when the original act was passed. In Omaha Street Railway Co. v. Interstate Commerce Commission, 230 U. S. 324, decided June 9, 1913, this difference of opinion was settled by holding that "railroads" as used in the interstate commerce act was limited to railroads as distinguished from street railroads, and that the proviso of June 28, 1910, above quoted, was probably inserted out of an abundance of caution and did not warrant the holdings previously made by the Interstate Commerce Commission and by the Commerce Court, that ordinary street electric railways engaged in interstate transportation of passengers had been brought within the jurisdiction of the Interstate Commerce Commission. This case will be referred to again at more length, but

before doing so, the several additional references to street elec-
92 tric railways in the interstate commerce act should be noted.

In section 1, paragraph 22, transportation act, 1920, it is provided: "The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

New section 15a is, in part, as follows: "When used in this section * * * the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this act, excluding (a) sleeping car companies and express companies, (b) *street or suburban electric railways* unless operated as a part of a general steam railroad system of transportation, (c) *interturban electric railways* unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." It should be noted that this definition of the word "carrier" is for the purposes of section 15a. That section has for its object the establishment of such tariff rates as will enable the carriers, either as a whole or in groups, to earn an annual net railway operating income equal as near as may be to a fair return upon the aggregate value of their property. In passing it should also be noted that the provisions of this section and of section 20a are the main support of the enlarged jurisdiction of the Interstate Commerce Commission to fix purely intrastate rates, as will appear from a reading of Chief Justice Taft's opinion in the Wisconsin passenger fare case above cited.

New section 20a provides, in part, as follows: "That as used in this section the term 'carrier' means a common carrier by railroad
(except a street, suburban, or interurban electric railway
93 which is not operated as a part of a general steam railroad system of transportation), which is subject to this act, or any corporation orgainzed for the purpose of engaging in transportation by railroad subject to this act." This definition likewise is for the purpose of that section, and the section deals with the issue of capital stock or other securities by railroads, and confers wide powers with respect thereto upon the Interstate Commerce Commission.

The foregoing are all the references to street electric railways or interurban railways found in the interstate commerce act. However, two other references thereto are found in other parts of the transportation act of 1920. In section 209, providing for a guaranty to carriers during a limited period after termination of Federal control, it is provided: "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under

Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, *which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.*"

In section 300, Title III, creating the Labor Board to deal with disputes between carriers and their employees and subordinate officials, it is provided: "When used in this title (1) the term 'carrier' includes any express company, sleeping car company, and any carrier by railroad, subject to the interstate commerce act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

94 Summarizing and bringing together the references to carriers above quoted, otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Despite theses differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal

95 source of operating revenue, urban, suburban, or interurban passenger traffice or sale of power, heat and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the commission. If they have those characteristics, obviously they would be under the jurisdiction

of the commission. This being true, does if not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these disngushing characteristics? Before this question is answered we shall review the pertinent decisions.

As already stated, the Interstate Commerce Commission early assumed jurisdiction over street or interurban electric railways if engaged to any extent in the interstate transportation of passengers, even if not engaged in the general transportation of freight. See the references above given. In Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission, 179 Fed. 243, Circuit Judges Sanborn, Hook, and Adams, differing from the Interstate Commerce Commission, held that street railway companies engaged in operating street cars by electricity for the transportation of passengers were not within the definition of common carriers by railroad as used in section 1 of the Interstate Commerce Act, but that common carriers by railroad meant commercial railroad companies engaged in the general transportation of freight and passengers. Accordingly a preliminary injunction was awarded against the commission's order undertaking to regulate interstate transportation of passengers by an electric street railway. This case was transferred to the United States Commerce Court, and that court, on final hearing, reversed the circuit judges. See 195 Fed. 40. The United States Supreme Court, in Omaha Street Railway Co. v. Interstate Com-
96 merce Commission (supra), reversed the Commerce Court and affirmed the Circuit Court. In appraising the force and effect of this decision it is necessary to take into account the long line of Interstate Commerce Commission decisions prior thereto holding to the contrary, and to note carefully the reasoning of the Commerce Court in sustaining them. There is marked similarity in that reasoning and in the reasoning of the later opinions of the Interstate Commerce Commission upon the basis of which the order now under consideration was made.

Mr. Justice Lamar, delivering the unanimous opinion of the Supreme Court holding that street electric railways, although engaged in interstate transportation of passengers, were not common carriers by railroad, as defined in section 1 of the Interstate Commerce Act, gives reasons therefor which, it seems to us, are as sound to-day as they were in 1913. He says: "Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads which themselves are further connected with others so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic and for the use of a single community, even though that community

be divided by State lines or under different municipal control. When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887." Further, "the railroads referred to in the act were not those having separate, distinct, and local street lines but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily
97 and expeditiously moved in interstate commerce." The mischief which Congress intended tor remedy by the interstate commerce act is adverted to as a reason tending to show that street electric railroads were not within the purview of section 1. Street railroads, he said, "had not engaged in the pooling, rebating, and discrimination which the statute was intended to prohibit." The question, it is true, is left open as to the proper classification of that new type of interurban railway developed since 1887 and which, with electricity as motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is intimated that such electric interurban railways might be included within the definition of "common carrier by railroad" as used in section 1, but no opinion is expressed.

So far as we have discovered, the United States Supreme Court has not again given any consideration to this precise question. It has, however, considered the definition of a street or electric interurban railway as used in the safety appliance act and the federal employers' liability law (see Kansas City v. McAdow, 240 U. S. 51; Spokane & Inland R. R. Co. v. Campbell, 241 U. S. 17), and has held that an interurban electric railway operating from city to city and engaged in interstate traffic is within the purview thereof. The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, and inasmuch as interurban electric railways engaged in the interstate transportation of passengers are within the mischief to be remedied just as much as interstate steam railroads, the exception should be limited to street railways within cities and upon city streets and in their immediate suburbs. On the other hand, the rule of construction applicable to acts of Congress encroaching upon the power of a State to regulate and control the transportation of passengers and property
98 within a State is one of strict construction and will not include intrastate traffic unless the intent is plainly expressed. Thus, in Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, it is said: "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested."

In South Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537, much relied on by defendants the decision is wholly inapplicable and deals with entirely different questions. Nor does it seem to us that the question under consideration is materially affected, much less controlled, as is contended by defendants' counsel, by the Shreveport case (supra), American Express Co. v. Caldwell (supra), Illinois Central R. R. v. Public Utilities Commission (supra), nor by new paragraphs 3 and 4, section 13, interstate commerce act, nor by the decision in the Wisconsin rate case. The question here is, What interstate carriers by railroad and what classes of interstate and intrastate traffic are brought within the jurisdiction of the Interstate Commerce Commission? This is a question of intention and is to be ascertained from the provisions of the interstate commerce act, including its original as well as amended provisions, and the several decisions of the Supreme Court construing the same. The decision in the Wisconsin rate case rests heavily, if not entirely, upon new section 15a and new section 20a, both of which excluded street and interurban electric railways from the purview thereof unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. The newly-added powers and duties, including those conferred by paragraphs 3 and 4 of
99 new section 13, apply only to railroads of a certain character and do not include electric street and interurban railways unless thus engaged. Assuming for the purpose of this opinion the existence in Congress of a power to include all street and interurban electric railways, and to invalidate all municipal and State franchises relating to purely intrastate traffic, upon the principles of the Shreveport and Wisconsin rate cases, nevertheless the intent so to do will not be inferred unless and except so far as it is clearly manifested.

From the foregoing considerations we deduce these conclusions: Electric street, suburban, or interurban railways are included within "common carriers by railroad." as that expression is used in section 1 of the interstate commerce act, only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. This, it seems to us, is the only proper interpretation and effect of the several amendments to the

interstate commerce act made since the decision in the Omaha Street Railway case. In that case, as already stated, it was left a query as to whether the act included the new type of interurban railroad developed since the original act was passed, which operates with electricity as motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and mail for long distances at high speed. It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language, but it used other language continuously and consistently which does exclude all electric street or interurban railways which do not possess these dominating characteristics, that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated nor doing business of that character in the situation in which they were left by the decision in the Omaha Street Railway case. This conclusion is greatly strengthened by the additions to the interstate commerce act made by the transportation act of 1920. The establishment of the Labor Board to settle controversies between carriers and employees, the guaranty for a limited period of a fixed return upon railroads, the grouping of railroads into classes and requiring rates to be fixed so as to allow a fair return to be earned on the property as a whole, the control assumed and exercised over the construction of new railroads, and the making of extensions and the issuance and sale of securities, are all a part of a general scheme from which all street or interurban electric railways are excluded unless possessing these characteristics.

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The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving over these switches a few carloads of inbound freight; and so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express

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business. It is true that the commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed.

MAURICE H. DONAHUE,
Circuit Judge.
JOHN M. KILLITS,
D. C. WESTENHAVER,
District Judges.

(All italics in sections and in quotations of statutes and from opinions are mine, unless otherwise noted.)

102 In United States District Court.

Order granting preliminary injunction and denying motion to dismiss, filed and entered March 13, 1922, Maurice H. Donahue, Circuit Judge, John M. Killits, D. C. Westenhaver, District Judges.

[Title omitted.]

This cause having been heretofore, to-wit, December 27, 1921, heard, argued, and submitted on plaintiff's application for a preliminary injunction, and on the motions of the defendants, United States of America, and The Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss plaintiff's bill, and the court having duly considered the same, it is adjudged, ordered, and decreed that the motions to dismiss be, and they are hereby, overruled, and that a preliminary injunction be, and is, awarded as prayed in plaintiff's bill, enjoining and restraining said defendants, until the further order of this court, from putting into force and effect the order of the Interstate Commission herein complained of, made on the 7th day of November, 1921, so far as said order authorizes, permits, and requires the defendant railway company to establish, maintain, and collect passenger fares greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

Plaintiff being a municipal corporation, no bond is required.

103 In United States District Court.

Final decree, filed and entered November 20, 1923, by Maurice H. Donahue, Circuit Judge, John M. Killits, D. C. Westenhaver, District Judges.

[Title omitted.]

This cause came on for final hearing at this term on the record as stipulated by the parties as shown by the stipulation on file; and the same was argued by counsel and submitted to the court; whereupon, upon consideration whereof, it was further ordered, adjudged, and decreed as follows:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of The Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants, The Interstate Commerce Commission and The Steubenville, East Liverpool and Beaver Valley Traction Company, and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1921.

To all of which the defendants and each of them and their respective counsel severally object and except.

104 In United States District Court.

Order that certified copies of ordinances of city of Wellsville be received in evidence, filed and entered November 20, 1922, by Maurice H. Donahue, Circuit Judge and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

This cause came on for hearing; and whereupon the counsel for plaintiff offered certified copies of certain ordinances of the city of Wellsville and numbered 181, 408, 594, 610, and 649, to which offer the counsel for the United States and the counsel for the Interstate Commerce Commission in open court objected; whereupon it was ordered that such obligations be overruled and that such certified copies be received in evidence on the issues between plaintiff and defendant, The Steubenville, East Liverpool and Beaver Valley Traction Company only; to which ruling of the court, the counsel for the United States and the counsel for the Interstate Commerce Commission then and there in open court objected and excepted.

105 *Ordinance No. 181.*

Granting permission to Albert L. Johnson, Sidney H. Short and C. E. Grover of Cleveland, Ohio, their successors and assigns, to construct, maintain, and operate an electrical street railroad, with a single track, and the necessary turn-outs, turn-tables, side-tracks, poles, wires and appurtenances from, at, or near the east corporate limits of Wellsville, at or near the county road leading from East Liverpool to Wellsville, thence along said road and a trestle across Yellow Creek to Coal Street, or State Road, thence along said Coal Street to Third Street, thence along Third Street to Main Street, thence along Main Street to Nicholson Lane, and fixing the terms and conditions of said grant, for the period of twenty-five years.

Section 1. Be it enacted by the council of the city of Wellsville, Ohio, that Albert L. Johnson, Sidney H. Short and C. E. Grover, of Cleveland, Ohio, their successors and assigns are hereby granted permission to construct, maintain, and operate for the period of twenty-five years an electrical street railroad, with a single track and the necessary switches, turn-outs, turn-tables, side-tracks, poles, wires, and appurtenances, through the city of Wellsville, Ohio, along the following route:

Beginning at or near the east corporate limits of Wellsville, at the county road, leading from East Liverpool to Wellsville, thence along said road and a trestle bridge across Yellow Creek to Coal Street, or State Road, thence along Coal Street to Third Street; thence along Third Street to Main Street, thence along Main Street to Nicholson's Lane.

Section 2. All said tracks shall be laid under the direction of the improvement committee of the city council, and in all streets or parts of streets along said route, which are paved at the time of constructing said street railroad therein, said grantees shall use in constructing their tracks, and its turn-outs and side tracks a steel girder
106 rail of the most approved pattern for such purpose, and weighing not less than eighty-two pounds to the yard; and in all streets and highways along said route not paved when said tracks are constructed therein, said grantees shall use a heavy T rail and shall, during the period of this grant so maintain the surface of the roadway within said tracks and outside the said T rails, except on trestles, as that vehicle in said roadway shall not be obstructed in crossing said tracks at any point in and along said highway.

At all points along said route where pavement is laid when said tracks are constructed, and whenever along said tracks the roadway shall be paved by said city, the said grantees, for themselves, their successors and assigns, shall disturb, take up, or injure the same, in all such cases restoring such pavement to as good condition as the same was in before so taken up, disturbed, or injured by grantees, their successors or assigns.

Section 3. In all streets and parts of streets along said route where pavement is laid when such track is constructed said track shall

be laid in the center of said street, except that between Twelfth Street and Nicholson's Lane in Main Street said track shall be laid as near as practicable to the south line of said street, and in all streets and highways not paved when said track is constructed, such track shall be located and constructed therein as shall be most convenient for general use of said highway and the railroad use therein. And in all streets and highways along said route not paved when said track is constructed, but which hereafter be paved, there grantees agree to substitute girder rail for T rail when such pavement is made. And whenever the city council shall cause any change of grade of any street or highway along said route, the grantees for themselves, their successors and assigns, agree at their own expense to alter the grade of their railroad tracks
107 and make them conform to such changed grade of such street or highway, the city, however, in any and every change of grade to bear the expense of relaying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb, remove, or interrupt travel over said tracks whenever and wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges, culverts, or other municipal purposes, and when the street in any such case is restored, the grantees, their successors and assigns, shall there restore, relay and connect their said track at their own expense.

Section 4. The grantees, their successors and assigns, of said railroad, and the permission herein granted, hereby agree to hold said city of Wellsville harmless of and from all damages and injuries caused by said grantees, their successors and assigns, in or by the construction, maintenance, or operation of said electrical street railroad and its appurtenances, and agree to place good and sufficient cars and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and the council may require.

Section 5. The said grantees shall, if they accept the provisions of this ordinance, file such acceptance in writing with the clerk of the city of Wellsville, within thirty days after the passage thereof, and within said time file a bond with the city clerk, in the sum of $5,000.00, conditioned for the faithful performance of all the conditions of their ordinance, and shall begin construction of said railroad within ninety days of such acceptance, and shall have said railroad completed and in operation within one year from the expiration of said ninety days; and on failure to perform either of these within the time specified, or any other condition of this ordinance, except for cause beyond the control of grantees, this ordinance shall be absolutely void.

Section 6. Upon the acceptance of this ordinance the
108 construction of the street railroad hereunder, grantees, their successors and assigns, shall have the right to charge and collect fares of five cents each for each ride of each passenger carried over the whole or any part of said route or any extension

thereof, and tariff for each parcel of freight of ten cents per each hundred pounds or fraction thereof carried over the whole or any part of said route, or any extension thereof; provided no charge shall be made for children under five years of age, accompanied by parents or guardians, and no charge shall be made for baggage or parcels carried in the hands of the passengers.

Grantees, their successors and assigns, may use upon their cars either conductors or fare boxes, as they may find most practicable.

The city of Wellsville, by its council, hereby agrees not to change the rate of fare or tariff in this section, provided during the period of this ordinance granted, and that it will not, within such period, make any other requirements or exaction of grantees, their successors or assigns, in respect of pavement, cars, or maintenance of roadway, than in this ordinance provided.

Section 7. This ordinance shall take effect on its passage and publication, and payment of costs of publication of ordinance and former notice, and the filing of written acceptance of its terms and conditions as herein provided.

Passed September 14, 1891.

J. W. NIXON, *Pres. of Council.*

C. B. MAYLONE, *City Clerk.*

Section 12. This ordinance is upon condition and the grantee hereunder, for itself, its successors and assigns, agrees that in the event of the right being granted by the city to other street railway companies to operate cars in the said city, this granted, its successors or assigns, will permit said other company or com-
109 panies to cross its tracks with their tracks at all points deemed by council of the city proper and reasonable.

Section 13. This ordinance and grant are upon the further condition, viz: That said grantee, its successors or assigns, shall bear the expense of repaving the width of its ties along all streets on which its tracks are laid, on which the city shall at any time during the period of this grant deem necessary to repave, by reason of the paving being worn or out of repair.

Section 14. Said The East Liverpool Railway Company shall file its written acceptance of the provisions of this ordinance with the city clerk within ten days from its passage, otherwise same shall be null and void.

Section 15. This ordinance shall take effect and be in force on its passage and legal publication and the filing of the written acceptance of its terms and conditions as hereinbefore provided, the company to pay the cost of publication.

Passed November 19th, 1901.

D. F. STEINER,
President of Council.

J. W. MCQUEEN, *City Clerk.*

110 (Ordinances of the city of Wellsville, numbered 408, 594, 610, and 649, filed December 9, 1922.)

Ordinance No. 408.

Granting the East Liverpool Railway Company, its successors and assigns, permission to extend its tracks, and construct, maintain, and operate electrical street railroad with single track and the necessary passing sidings, turntables, poles, wires, and appurtenances on Eighteenth Street and Clark Avenue, in Wellsville, Ohio, and fixing the terms and conditions of said grant for a period of twenty-five years and renewing and extending for the same period the grant and franchise now owned by said company.

Section one. Be it ordained by the council of the city of Wellsville, Ohio, that the East Liverpool Railway Company, its successors and assigns, is hereby granted permission to construct, maintain, and operate for a period of twenty-five years from date of the final passage of this ordinance, an electrical street railroad, with a single track, and the necessary passing sidings, turntables, poles, wires, and appurtenances, on the following streets in the city of Wellsville, Ohio, viz: On Eighteenth Street (also called Nicholson's Avenue) from Main Street to Clark Avenue, and on Clark Avenue from Eighteenth Street southerly to the southern end of Clark Avenue.

Section two. All tracks shall be laid under the direction of the city engineer of the city of Wellsville, Ohio, and said grantee shall use in constructing its tracks and passing sidings a steel girder rail of the most approved pattern for such purpose, and weighing not less than seventy-two pounds to the yard, with flange way not less than three inches wide.

Section three. The tracks aforesaid shall be located on said street to the approval of the improvement committee of the city council at the time of the construction of the work: provided, however, that no passing sidings or turntables shall ever be allowed on Eighteenth Street, and the tracks of said grantee shall be located on the southern side of Eighteenth Street.

Section four. All tracks shall be laid to the established grade of said streets, and whenever the city council shall cause any change of the grade of any street along said route, said The East Liverpool Railway Company, its successors and assigns, agree at their own expense to alter the grade of their railroad tracks and make them conform to such changed grade of such street, the city, however, in any and every such change of grade to bear the expense of relaying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb or remove said tracks or interrupt travel over said tracks whenever or wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges or culverts, or for other municipal purposes, and when the street in such case is restored the East Liverpool Railway Company, its successors or

assigns, shall then restore, relay, and connect said track at their own expense.

111 Section five. At all places along the aforesaid route where pavement is laid when said tracks are constructed, and wherever along said tracks the roadway shall hereafter be paved, the said The East Liverpool Railway Company, for itself, its successors and assigns, bind themselves to relay and repair such pavement whenever and wherever they shall disturb, take up, or injure the same, in all such cases restoring the pavement to as good condition as the same was in before so taken up, disturbed, or injured. Provided, further, that if said The East Liverpool Railway Company shall fail to relay and repair such pavement within thirty days notice from the city, then the city may relay and repair same at the expense of said The East Liverpool Railway Company, its successors or assigns.

Section six. This ordinance and the grant therein contained is upon the following condition, to-wit: That whenever the city shall pave Clark Avenue, Lisbon Street, and Liverpool Street, or either of them (now unpaved) the said The East Liverpool Railway Company, its successors or assigns, shall bear all the expense of paving the width of its ties, to be not less than eight feet, for the entire length of its tracks on said streets, and said The East Liverpool Railway Company binds itself, its successors and assigns, to pay to said city the cost and expense of said paving within thirty days from the completion of said work and notice from the city, and further to pay the cost of the recent re-paving of Third Street from Broadway to Lisbon Street, for the width of its ties, within thirty days from the passage of this ordinance.

Section seven. The said The East Liverpool Railway Company for itself and its successors and assigns of the permission herein granted, agrees to hold the said city of Wellsville, Ohio, harmless from all damages and injuries caused by the construction, maintenance, or operation of said electrical street railroad and its appurtenances, and agree to place good and sufficient cars and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and the city council may require.

Section eight. This ordinance is upon condition that the road built hereunder be operated in connection with and as an extension of the present railway lines of said grantee, in Wellsville and East Liverpool and between said cities, and extensions thereof, and no extra fare or freight tariffs shall be charged by said company or its successors or assigns for service on this extension, but the regular fare on the other parts of said line shall include service to and from all parts of this extension to and from all other parts of said company's lines.

Section nine. The said The East Liverpool Railway Company agrees to complete the construction of its tracks and operate its cars over the entire route herein granted April 1st, 1902, and if it fails to

so construct and operate said road by said date, this ordinance shall then be and become null and void.

Section ten. At any time after the completion of the construction of the street railroad over the route provided for by this ordinance, if the city council shall deem it to the public interest that said railroad be extended from the southern terminus, to the south corporate limits of Wellsville, and the necessary consent of property owners be given therefor, the East Liverpool Railway Company binds itself, its successors and assigns, to extend said street railroad and operate same to such south corporate limits, within ninety 112 days after notice so to do by resolution of the city council and the passing of an ordinance by said council granting said right.

Section eleven. The rights, privileges, and franchises granted by ordinance of this council to Albert L. Johnson, Sidney H. Short, and C. E. Grover, their successors and assigns, September 14, 1891, see ordinances of Wellsville, Ohio, pages 180, 181, and 183, inclusive (to which reference is hereby made for the full detail and text of the ordinance above mentioned), which rights, privileges and franchises are now owned and exercised by said The East Liverpool Railway Company, as successors and assigns of the above-named individuals, are hereby renewed, reaffirmed, and extended to said The East Liverpool Railway Company, its successors and assigns, for a period of twenty-five years from and after the passage and legal publication of this ordinance, and upon the same terms and subject to the same conditions contained in said original ordinance above mentioned. The original ordinance above mentioned is in language and terms as follows, to-wit:

"Granting permission to Albert L. Johnson, Sidney H. Short, and C. E. Grover, of Cleveland, Ohio, their successors and assigns, to construct, maintain and operate an electrical street railroad with single track, and the necessary turnouts, turntables, side tracks, poles, wires, and appurtenances, from, at, or near the east coporate limits of Wellsville, at or near the county road leading from East Liverpool to Wellsville; thence along said road and a trestle across Yellow Creek to Coal Street, or State Road; thence along said Coal Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Nicholson's Lane, and fixing the terms and conditions of said grant for the period of twenty-five years.

1. Be it ordained by the city council of the city of Wellsville, Ohio, that Albert L. Johnson, Sidney H. Short and C. E. Grover, of Cleveland, Ohio, their successors and assigns, are hereby granted permission to construct, maintain and operate for the period of twenty-five years an electrical railroad with a single track and the necessary switches, turnouts, turntables, side tracks, poles, wires, and appurtenances, through the city of Wellsville, along the following route: Beginning at or near the east corporate limits of Wellsville at the county road leading from East Liverpool to Wellsville; thence along said road and a trestle bridge across Yellow Creek to

Coal Street or State Road; thence along Coal Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Nicholson's Lane.

All tracks shall be laid under the direction of the improvement committee of the city council, and in all streets and parts of streets along said route which are paved at the time of constructing said street railroad thereon said grantees shall use in constructing their tracks and its turnouts and side tracks a steel girder rail of the most approved pattern for such purpose, and weighing not less than eighty-two pounds to the yard, and in all streets and highways along said route not paved when said tracks are constructed therein said grantees shall use a heavy "T" rail, and shall during the period of this grant so maintain the surface of the roadway within said tracks and outside of the "T" rails, except on trestles, so that vehicles in said roadway shall not be obstructed in crossing said tracks at any point in and along said highways. At all points along said route where pavement is laid when said tracks are constructed and wherever along said tracks the roadway shall hereafter be paved by said city, the said grantees, for themselves their successors
113 and assigns bind themselves to relay and repair such pavement wherever and whenever said grantees, their successors and assigns, shall disturb, take up, or injure the same, in all such cases restoring such paving to as good condition as the same was in before so taking up, disturbed, or injured by grantees, their successors or assigns.

3. In all streets and parts of streets along said route where pavements are laid when said track is constructed, said track shall be laid in the center of such street, except that between Twelfth Street and Nicholson's Lane in Main Street said track shall be laid as near as practicable to the south line of said street, and in all streets and highways not paved when said track is constructed such track shall be located and constructed therein as shall be most convenient for the general use of said highway and the railroad use therein.

And in all streets and highways along said route not paved when said track is constructed, but which shall thereafter be paved, these grantees agree to substitute girder rails for "T" rails when such pavement is made, and whenever the city council shall cause any change of grade of any street or highway along said route the grantees for themselves, their successors and assigns, agree at their own expense to alter the grade of their railroad tracks and make them conform to such changed grade of such street or highway; the city, however, in any and every such case of change of grade to bear the expense of re-laying all pavement disturbed by such change of grade. The city reserves to itself the right to disturb, remove, or interrupt travel over said tracks whenever and wherever it shall be necessary to construct or repair sewers, water or gas pipes, bridges or culverts, or other municipal purposes, and when the street in any such case is restored, the grantees, their successors and assigns, shall

restore, and shall relay and connect their said track at their own expense.

4. The grantees, their successors and assigns, of said railroad, and the permission herein granted, hereby agrees to hold said city of Wellsville harmless of and from all damages and injuries caused by said grantees, their successors and assigns, in or by the construction, maintenance, or operation of said electrical street railroad, and its appurtenances, and agree to place good and sufficient cars, and continue the same on said road with modern improvements, and run them daily as often and at such rates of speed as public convenience may demand and as the council may require.

5. The said grantees shall, if they accept the provision of this ordinance, file such acceptance in writing with the clerk of the city of Wellsville within thirty days after the passage thereof and within said time file a bond with the city clerk, to be approved by the city council, in the sum of $5,000 conditioned for the faithful performance of all the conditions of this ordinance, and shall begin construction of said railroad within ninety days after such acceptance and shall have said railroad completed and in operation within one year from the expiration of said ninety days; and on failure to perform either of these conditions within the time specified, or any other condition of this ordinance, except for cause beyond the control of grantees, this ordinance shall be absolutely void.

6. Upon the acceptance of this ordinance and the construc-
114 tion of the street railroad hereunder, grantees, their successors and assigns, shall have the right to charge and collect fares of five cents each for each ride of each passenger carried over the whole or any part of said route, or any extension thereof, and tariff for each parcel of freight of ten cents per each hundred pounds or fraction thereof carried over the whole or any part of said route or any extension thereof, provided no charges shall be made for children under five years of age, accompanied by parents or guardians, and no charge shall be made for baggage or parcels carried in the hands of the passengers. Grantees, their successors and assigns, may use upon their cars either conductors or fare boxes as they find most practicable. The city of Wellsville, by its council, hereby agrees not to change the rate of fare or tariff in this section provided during the period of this ordinance granted, and that it will not within such period make any other requirements or action of grantees, their successors and assigns, in respect of pavement, cars, or maintenance of roadway, than in this ordinance provided."

Section twelve. This ordinance is upon condition, and the grantee hereunder, for itself, its successors and assigns, agrees that in the event of the right being granted by the city to other street railway companies to operate cars in said city, this grantee, its successors and assigns, will permit said other company or companies to cross its tracks with their tracks at all points deemed by council of the city proper and reasonable.

Section thirteen. This ordinance and grant are upon the further condition, viz, that said grantee, its successors and assigns, shall bear the expense of repaving the width of its ties along all streets on which its tracks are laid, on which the city shall at any time during the period of this grant deem necessary to repave, by reason of the paving being worn or out of repairs.

Section fourteen. Said The East Liverpool Railway Company shall file its written acceptance of the provisions of this ordinance with the city clerk within ten days from its passage, otherwise same shall be null and void.

No. 408. Passed Nov. 19th, 1901.

D. F. STEINER,
President of Council.

J. W. MCQUEEN,
Clerk of Council.

Examined and approved by me November 19th, 1901.

A. P. DENNIS,
Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was passed by council and advertised as required by law, was duly published, and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.] E. G. BUNTING,
City Clerk.

115 *Ordinance No. 594.*

An ordinance granting to the East Liverpool Railway Company, its successors and assigns, permission to double track, maintain, and operate its street railroad in and on certain streets in the city of Wellsville, Ohio, and renewing and extending for the period of twenty-five years the grants and franchises now owned by said company.

Whereas the council of the city of Wellsville, Ohio, deems the double-tracking of the East Liverpool Railway Company's street railroad hereinafter authorized, beneficial to the public; and

Whereas the necessary consents of property owners therefor have been filed with the city clerk.

Therefore, be it ordained by the city council of the city of Wellsville, Ohio, as follows:

Section one. That the East Liverpool Railway Company be, and is hereby, authorized to lay an additional track parallel with its present track, and maintain and operate a double track street railway, with all the necessary switches, turnouts, turntables, wires, poles, and appurtenances, in, on, and along the following streets, viz: Beginning at or near the east corporation limits of Wellsville, Ohio, at the county road leading from East Liverpool to Wellsville; thence along the old county road known as Wells' Avenue or Liverpool Street to and across the bridge over Little Yellow Creek to Lisbon Street; thence

along Lisbon Street to Third Street; thence along Third Street to Main Street; thence along Main Street to Eighteenth Street or Nicholson Avenue; thence along Eighteenth Street or Nicholson Avenue to Clark Avenue; thence along Clark Avenue from Eighteenth Street or Nicholson Avenue to the west end thereof. Said additional track and the existing track shall be laid to the proper grade of the streets so that the center line between the two tracks shall be the center line of the streets, and the inner rail of each track shall be two feet and six inches from the center line of the street and parallel therewith as far as possible, except that from Twelfth Street to Eighteenth Street the tracks shall be laid as close as possible to the line of the Pennsylvania Company's land.

Section two. It is one of the conditions of this ordinance and one of the considerations of this grant for the use of said streets for a double track that grantee, or its successors or assigns, shall charge for a fare the sum of five cents for each person carried over the entire route from the westerly corporation line of Wellsville, Ohio, to the easterly corporation line of East Liverpool, Ohio, or the State line between Ohio and Pennsylvania or any part thereof, and no more, but policemen and regular paid firemen of said city when in uniform shall be carried free.

Section three. When constructing said line on Third Street and Main Street, said grantee, its successors and assigns, shall remove the old brick between the tracks and shall replace it with new brick, and all brick laid next the rails shall be of the kind commonly known as special rail brick. The tracks throughout said city shall be relaid upon at least fourteen inches of broken stone, and steel girder rails shall be used.

116 Section four. The present tracks shall be taken up and the new double track shall be fully relaid and completed within one year from the date of the passage of this ordinance. The said railway, its successors or assigns, shall open up but twelve hundred feet of street pavement at any one time in any one street and the same shall be fully restored to a proper condition and in good workmanlike manner, and any pavement or part thereof taken up shall be relaid within thirty days after it is so disturbed.

Section five. On the first day of October of each and every year during the exercise of this ordinance the said East Liverpool Railway Company, its successors and assigns, shall pay the city of Wellsville, Ohio, an annual tax of ten dollars upon each and every car operated on said lines within said city on regular schedule during the year ending on the first day of the preceeding September; but said tax shall not be paid upon such cars as are kept in reserve for cases of emergency or extraordinary traffic and which are not run on regular time schedules.

Section six. All the grants, privileges, and franchises mentioned herein and all parts of this ordinance shall be binding on the East Liverpool Railway Company, its successors and assigns, respectively,

and the same in like manner shall enure to the benefit of and be exercised by its grantees and assigns.

Section seven. If grantee fails to complete the said work of double tracking its road within the city at the time herein specified, then this grant shall become null and void at the election of the grantor, it being agreed that the time of performance of the work is of the essence of this grant, legal delays excepted.

Section eight. In order to carry out the provisions of this ordinance with reference to the proper laying of the tracks and the relaying of the brick pavement and the foundation put under the same, the mayor is hereby authorized to appoint not more than two inspectors at a salary of three dollars per day to see that such provisions are fully carried out when the work is in progress, which sum shall be paid by the grantees.

Section nine. Steam shall not be used as a motive power on the said road.

Section ten. The rights, privileges and franchises granted to Albert L. Johnson, Sidney H. Short and C. E. Grover, their successors and assigns, by ordinance of this council No. 181 passed September 14th, 1891, and to the East Liverpool Railroad Company, its successors and assigns, by ordinance of this council No. 408 passed November 19, 1901, being pages 238 and 246, inclusive, of the codified ordinance book of said city as codified in 1901, which rights and privileges are now owned by the East Liverpool Railroad Company, are hereby renewed, reaffirmed, and extended to said East Liverpool Railroad Company, its successors and assigns, upon the same terms and subject to the same conditions as are contained therein, for a period of twenty-five years from and after the passage and legal publication of this ordinance, and a like period of twenty-five years from and successors and assigns, shall have and exercise all the rights and privileges and franchises conferred upon it by this ordinance.

Section eleven. Within thirty days after the passage of this
117 ordinance, said grantee, or its successors and assigns, shall file with the clerk of this council its written acceptance of the provisions of this ordinance and shall also within said time file with the mayor a bond in the sum of twenty thousand dollars with sureties to be approved by the mayor, conditioned to indemnify the city against all loss and damage resulting to person or property during the construction of the railroad herein authorized and arising therefrom.

Section twelve. It is a condition of the granting of this franchise that in case said company and its employees are unable to amicably settle without strike or other interference with public rights any controversy or difference which may arise between them, then at the request of either the company or its employees, or if they refuse, at the request of the mayor or the president of council such controversy shall be submitted to a board of arbitration consisting of five disinterested persons, one of whom may be selected by the company, one by the employees and three of whom shall be appointed by the

judge of the Court of Common Pleas of Columbiana County, Ohio. In case any of the arbitrators thus chosen shall refuse to serve, his place shall be filled by said judge of the Court of Common Pleas. The finding of a majority of this board shall be binding upon all the parties to the controversy. The expense of the arbitration shall be borne by the company and its employees, one-half by each. This section shall apply to any other company which may hereafter operate cars over the lines constructed under this ordinance.

Section thirteen. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed Sept. 19, 1905.

A. B. CRUBAUGH,
President of Council.

J. W. MCQUEEN,
Clerk of Council.

Examined and approved by me Sept. 26th, 1905.

WALLACE L. FOGO,
Mayor.

Article of acceptance.

EAST LIVERPOOL, OHIO,
Oct. 4th, 1905.

To the hon. city council of the city of Wellsville, Ohio, gentlemen:

The East Liverpool Railway Company hereby accepts in writing the provisions of ordinance No. 594 passed by your honorable body Sept. 19th, 1905, approved by the mayor of said city, Sept. 26th, 1905, and entitled "An ordinance granting to the East Liverpool Railway Company, its successors and assigns, permission to double track, maintain and operate its street railroad in and on certain streets in the city of Wellsville, Ohio, and renewing and extending for the period of twenty-five years the grants and franchises now owned by said company." This written acceptance is filed in conformity with the provisions of section eleven of said ordinance.

THE EAST LIVERPOOL RAILWAY CO.,
By HEALY, *Pres.*

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WELLSVILLE, OHIO, *Oct. 4th, 1905.*

The above acceptance was filed with me this 4th day of October, 1905.

J. W. MCQUEEN, *City Clerk.*

I hereby certify that the foregoing ordinance was passed by council and advertised as required by law and was duly published and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.]

E. G. BUNTING,
City Clerk.

119 *Ordinance number 610.*

An ordinance granting to the East Liverpool Traction and Light Company, its successors and assigns, permission to extend its railroad to the southerly corporation limits of the city of Wellsville, Ohio, by the construction, maintenance and operation of a single or double track street railroad for a period of twenty-five (25) years.

Whereas all and singular the franchises, rights, and privileges granted to the East Liverpool Railway Company, by ordinance number 594 passed by the council of the city of Wellsville, on the 19th day of September, 1905, together with all and singular railroads constructed under and in pursuance thereof, or theretofore owned by the East Liverpool Railway Company, have been assigned, transferred, and conveyed to and are now owned by the East Liverpool Traction and Light Company, which company is now engaged in the operation of said railroads; and

Whereas the council of the city of Wellsville deems the extension of said railroad to the southerly corporate limits of the city beneficial to the public, and

Whereas the necessary consents of the property owners to such extension have been filed with the clerk of council:

Therefore, be it ordained and enacted by the council of the city of Wellsville, Ohio, as follows:

Section one. That the East Liverpool Traction and Light Company be, and is hereby, authorized to extend its railroad by the construction and maintenance of single or double tracks, and operate the same by the single overhead trolley system, or any other power than locomotive steam power, with the right to erect and maintain all necessary poles, wires, crossovers and other appurtenances for the proper operation of said railroad, in, on, and along the following streets, viz: Beginning at the present terminus of the street railroad on Clark Avenue; thence along Clark Avenue to Buckeye Avenue, formerly known as the Steubenville Road; thence along Buckeye Avenue southerly to the southerly line of Wellsville. The tracks of said railway shall be as near the praveled portion of Buckeye Avenue as possible and shall be laid to the proper grade of the street and wherever double tracks are laid the center line between the two tracks shall be as near the center line of the street as same can be ascertained, and the inner rail of each track shall be two feet and six inches from the said center line of said street and parallel therewith as far as possible.

Section two. It is one of the conditions of this ordinance and one of the considerations of this grant for the use of said street for single or double tracks that grantee, or its successors or assigns, shall charge for a fare the sum of five (5) cents and no more for each person carried over the entire route between the westerly corporation line of Wellsville, Ohio, and the State line between Ohio and Penn-

sylvania or any part thereof; but policemen and regularly paid firemen of said city, when in uniform, shall be carried free.

Section three. That the East Liverpool Traction and Light Company, its successors and assigns, shall pave between the rails of its tracks and to the ends of its ties, whenever and wherever the street outside of said ties is paves by the city, and with the same material that may be used by the city.

120 When the roadway is disturbed for the construction of said railway, the same shall be fully restored by the grantee, its successors and assigns, to a proper condition and in good workmanlike manner within sixty (60) days from the time same has been disturbed.

Whenever the council of said city shall by ordinance duly passed change the grade of said street, the said grantee, its successors and assigns, shall change its tracks so as to conform to the new grade, at its own expense. At all times where it shall become necessary to pave between said tracks all brick laid next the rails shall be of the kind commonly known as the special rail brick. Said tracks shall at all times be laid upon a foundation of at least fourteen (14) inches of broken stone or gravel, and steel girder rails shall be used.

Section four. The right to maintain and operate the tracks hereby granted shall continue in the East Liverpool Traction and Light Company, its successors and assigns, for the period of twenty-five (25) years from and after the 19th day of September, 1905.

Section five. Said single or double tracks shall be fully laid within one year from the date of the passage of this ordinance and if the said grantees, its successors and assigns, fails to complete the laying of said single or double tracks within the time herein specified, then this grant shall become null and void at the election of the grantor, it being agreed that the time of performance of the work is of the essence of this grant, legal delays excepted.

Section six. In order to carry out the provisions of this ordinance with reference to the proper laying of the tracks, paving, placing the foundation therefor, and locating said tracks in the street, the mayor is hereby authorized to appoint not more than two inspectors at a salary of three (3) dollars per day to see that said provisions are carried out fully when the said work is in progress, which sum shall be paid by the grantees, its successors or assigns.

Section seven. The said the East Liverpool Traction and Light Company, for itself and its successors and assigns, agrees to hold the said city of Wellsville, Ohio, harmless from all damages and injuries caused by the construction, maintenance, or operation of said street railroad, and its appurtenances.

Section eight. Should said grantor at any time during the term for which this franchise is granted, erect a fire station in said city, said grantee as part of consideration for this franchise, shall furnish twelve (12) sixteen (16) c. p. incandescent electric lights for said fire station without cost to said grantor.

Section twelve. Within thirty (30) days after the passage of this ordinance, said grantee, its successors and assigns, shall file with the clerk of the council its written acceptance of the provisions of this ordinance and shall pay for the publication of said ordinance.

121 Section thirteen. It is a condition of the granting of this franchise that in case said company and its employees are unable to amicably settle without strike or other interference with public rights any controversy or difference which may arise between them, then at the request of either the company, or its employees, or if they refuse, at the request of the mayor or the president of council, such controversy shall be submitted to a board of arbitration consisting of five (5) disinterested persons, one of whom may be selected by said company, one by the employes, and three of whom shall be appointed by the judge of the Court of Common Pleas of Columbiana County, Ohio. In case any of the arbitrators thus chosen refuse to serve, his place shall be filled by said judge of the Court of Common Pleas. The finding of a majority of this board shall be binding upon all parties to the controversy. The expense of the arbitration shall be borne by the company and its employes, one-half (½) each. This section shall apply to any other company which may hereafter operate cars over the line constructed under this ordinance.

Section fourteen. This ordinance shall take effect and be in force from and after the earliest period allowed by law. Passed by council June 18th, 1906.

Approved and examined by the mayor June 27th, 1906.

Accepted by said company July 19, 1906.

A. B. CRUBAUGH,
President of Council.
F. C. BLACKBURN,
Clerk of Council.
W. L. FOGO,
Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was passed by council and advertised as required by law, was duly published, and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.] E. G. BUNTING,
City Clerk.

122 *Ordinance number 649.*

An ordinance granting to the East Liverpool Traction and Light Company, its successors and assigns, permission to extend its line by locating double street railway tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street. And to use and maintain said tracks upon the terms and conditions and for the period provided

in ordinance number 594 but subject to certain conditions and stipulations herein made.

Whereas the East Liverpool Traction and Light Company is now owner of the rights and privileges and franchises granted to the East Liverpool Railway Company by ordinance number 594 passed by the council of the city of Wellsville, Ohio, on September 19th, 1905, and

Whereas the necessary consents of property owners therefor has been filed with the clerk of the council,

Therefore, be it ordained by the city council of the city of Wellsville, Ohio, that:

Section one. That the East Liverpool Traction and Light Company be, and it is hereby, authorized to lay double street railway tracks with all the necessary wires, poles, and appurtenances, in and along the following streets, viz: Beginning at the intersection of Seventeenth Street and Main Street; thence along Seventeenth Street to Clark Avenue; thence along Clark Avenue to Eighteenth Street. Said tracks shall be maintained and operated in connection with said company's present line, and shall be in lieu of the two tracks authorized by ordinance No. 594 on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue. The privilege originally granted by ordinances No. 181 and 594 to lay and maintain double or single tracks on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue shall be revoked and of no force and effect after acceptance by the East Liverpool Traction and Light Company of the terms of this ordinance and after completion of the tracks of said company on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street.

Section two. The said double tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street shall be laid to the proper grade of the streets so that the center line between the two tracks shall be the center line of the streets, and the inner rail of each track shall be two feet and six inches from the center line of the street and parallel therewith as far as possible. The work of laying said tracks and paving same as required herein shall be completed within one year from the passage of this ordinance, legal delays excepted.

Section three. The said the East Liverpool Traction and Light Company shall pave on Seventeenth Street that portion of the street lying between the outer rails of the two tracks and to the outer ends of the ties at such time as Seventeenth Street shall be paved by action of council.

123 Section four. Where it becomes necessary for said The East Liverpool Traction and Light Company to open any paved street same shall be fully restored to a proper condition and in good

workmanlike manner and any pavement or part thereof taken up shall be relaid within sixty days after it has been disturbed.

Section five. The said The East Liverpool Traction and Light Company shall within sixty days from the completion of its tracks on Seventeenth Street from Main Street to Clark Avenue and on Clark Avenue from Seventeenth Street to Eighteenth Street, remove from the streets the tracks and ties now in use on Main Street from Seventeenth Street to Eighteenth Street and on Eighteenth Street from Main Street to Clark Avenue, and the pavement shall be relaid on a foundation of at least fourteen (14) inches of broken stone or gravel. Said pavement shall be restored to a proper condition and in good workmanlike manner within sixty days after the same has been disturbed and all broken or chipped brick shall be replaced by new ones.

Section six. Within thirty days after the passage of this ordinance, said The East Liverpool Traction and Light Company, its successors and assigns, shall file with the clerk of this council its written acceptance of the provisions of this ordinance. The said The East Liverpool Traction and Light Company shall pay for the publication of this ordinance.

Section seven. The maintenance, use, and operation of said street railway tracks shall be governed in all respects by the provisions and conditions of said ordinance No. 594 so far as the same are applicable thereto and not inconsistent with this ordinance, and said company, its successors and assigns, shall have the right to maintain and use the same for a period of twenty-five years from and after the date of the legal publication of said ordinance No. 594.

Section eight. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed November 25th, 1907.

A. B. CRUBAUGH,
President of Council.
F. C. BLACKBURN,
Clerk of Council.

Examined and approved by W. L. Fogo, Mayor.

I, E. G. Bunting, clerk of the city of Wellsville, Ohio, do hereby certify that the foregoing ordinance was duly passed by the council of the city of Wellsville, Ohio, and was duly advertised as required by law, was published and is now a valid and existing ordinance of said city of Wellsville, Ohio.

[SEAL.]

E. G. BUNTING,
City Clerk.

124 [Certificate of city clerk to ordinances Nos. 408, 594, 610 and 649 omitted in printing.]

[File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Stipulation for record for final hearing.

Filed Nov. 20, 1922.

By their respective counsel, the parties stipulate that the following matter shall constitute the record for the final hearing in the above-entitled cause, viz:

1. Bill in equity and exhibits.
2. Report, findings and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission, and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company, and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. As between the plaintiff and the Steubenville, East Liverpool & Beaver Valley Traction Company only, copies of the ordinances numbered 181, 408, 594, and 610 and 649 admitted in evidence by order of court over the objections and exceptions of the counsel for the United States and the counsel for the Interstate Commerce Commission who protest that the same are not properly a part of the record on any issue in the case.

Jos. E. O'Grady,
W. A. O'Grady,
Solicitors for Plaintiff.

126 Blackburn Esterline,
Assistant Solicitor General for the United States.
Edward M. Reidy,
Attorney for Interstate Commerce Commission.
Agnew Hice,
Tolles, Hogsett, Ginn & Morley,
Solicitors for the Steubenville, East Liverpool & Beaver Valley Traction Company.

127 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the United States of America and Interstate Commerce Commission to the Attorney General of Pennsylvania.

Filed January 15, 1923.

[Title omitted.]

To the Honorable George E. Alter, Attorney General of the State of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.

Service of the above notice is hereby acknowledged.
Dated at Harrisburg, Pa., this 13″ day of January, 1923.

GEO. E. ALTER,
Attorney General.

128 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of the United States of America and Interstate Commerce Commission to the Attorney General of Ohio.

Filed January 11, 1923.

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by United States of America, defendant, and Interstate Commerce Commission, intervening defendant, in the above-entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the

same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.

Service of the above notice is hereby acknowledged.
Dated at Columbus, Ohio, this 10th day of January, 1923.

C. C. CRABBE, *Atty. Gen.*

129 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by United States of America and Interstate Commerce Commision.

Filed Dec. 21, 1922.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court made and entered November 20, 1922, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcrip of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

130 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the United States of America and Interstate Commerce Commission.

Filed Dec. 21, 1922.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come by their respective counsel, and in connection with their petition for appeal, file the following asignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

1. In granting the application for preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission of November 7, 1921, "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092, so far as said order authorizes, permits and requires the Steubenville, East Liverpol & Beaver Valley Traction Company to establish, maintain, and collect passenger fares

131 greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

2. In overruling the motion of the United States to dismiss the petition and in not sustaining the motion.

3. In holding and adjudging that the city of Wellsville was a proper party to maintain the complaint in equity and in not holding and adjudging that the court was without jurisdiction to entertain the same.

4. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092, under the power and authority conferred upon it by the acts to regulate commerce.

5. In holding and adjudging that the Steubenville, East Liberpool & Beaver Valley Traction Company "is a street and interurban electric passenger railway, and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight."

6. In holding and adjudging that the Steubenville, East Liverpool & Beaver Valley Traction Company is not subject to the jurisdiction and regulation of the Interstate Commerce Commission.

7. In permanently annulling, setting aside, and holding for naught the order of the Interstate Commerce Commission of November 7,

1921, entitled "Ohio and Pennsylvania Rates, Fares and Charges," etc., No. 12092.

8. In making permanent the preliminary injunction and in permanently enjoining and restraining the Steubenville, East Liverpool & Beaver Valley Traction Company and the Interstate Commerce Commission from putting into effect the order of the commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

132 9. In making and entering the following order, viz:

This cause came on for hearing; and whereupon the counsel for plaintiff offered certified copies of certain ordinances of the city of Wellsville and numbered 181, 408, 594, 610, and 649, to which offer the counsel for the United States and the counsel for the Interstate Commerce Commission in open court objected; whereupon it was ordered that such objections be overruled and that such certified copies be received in evidence on the issues between plaintiff and defendant, the Steubenville, East Liverpool and Beaver Valley Traction Company only; to which ruling of the court the counsel for the United States and the counsel for the Interstate Commerce Commission then and there in open court objected and excepted.

10. In making and entering the following final decree:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants, the Interstate Commerce Commission and the Steubenville, East Liverpool and Beaver Valley Traction Company, and each of them, be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1922.

Wherefore, defendant and intervening defendant and each of them pray that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and the preliminary injunctions shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

E. S. WERTZ,
United States Attorney,
Northern District of Ohio.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARREL,
Solicitor for Interstate Commerce Commission.

133 In United States District Court.

Order allowing appeal of U. S. of America and Interstate Commerce Commission, filed December 29, 1922, and entered by Maurice H. Donahue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entiled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

134 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company to the Attorney General of Pennsylvania.

Filed Jan. 15, 1923.

[Title omitted.]

To the Honorable George E. Alter, Attorney General of the State of Pennsylvania:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

AGNEW HICE AND T. H. HOGSETT,
Attorney for the Steubenville, East Liverpool & Beaver Valley Traction Company.

Service of the above notice is hereby acknowledged, dated Harrisburg, Pa., this 13th day of January, 1923.

GEO. E. ALTER.
Attorney General.

135 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

Notice of appeal of the Steubenville, East Liverpool & Beaver Valley Traction Company to the Attorney General of Ohio.

[Title omitted.]

To the Honorable Charles C. Crabbe, Attorney General of the State of Ohio:

You are hereby notified that on the 29th day of December, 1922, an order was entered allowing an appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant in the above entitled cause, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty days from the date the same was made and entered.

This notice is given you pursuant to chapter 32 at pages 220 and 221 of the statutes of the United States passed at the first session of the Sixty-third Congress, 1913.

T. H. Hogsett and Agnew Hice,
Attorney for The Steubenville, East Liverpool & Beaver Valley Traction Company.

Service of the above notice is hereby acknowledged.

Dated at Columbus, Ohio, this 10th day of January, 1923.

C. C. Crabbe, *Atty. General.*

136 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Petition for appeal by the Steubenville, East Liverpool & Beaver Valley Traction Company.

Filed Dec. 22, 1922.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, feeling itself aggrieved by the final order or decree of the District Court made and entered November 20, 1922, prays an appeal to the Supreme Court of the United States therefrom.

The particulars wherein it considers the final order of decree erroneous are set forth in the assignment of errors on file to which reference is made.

The Steubenville, East Liverpool & Beaver Valley Traction Company prays that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly

authenticated, may be transmitted forthwith to the Supreme Court of the United States.

AGNEW HICE AND T. H. HOGSETT,
Solicitors for The Steubenville, East Liverpool & Beaver Valley Traction Company.

137 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Assignment of errors by and on behalf of the Steubenville, East Liverpool & Beaver Valley Traction Company.

Filed December 22, 1922.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, now comes by its counsel, and in connection with the petition for appeal, files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court entered November 20, 1922.

The District Court erred:

1. In granting the application for preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission of November 7, 1921, "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092, so far as said order authorizes, permits, and requires the Steubenville, East Liverpool & Beaver Valley Traction Company to establish, maintain, and collect passenger fares greater than, or different from, the rates of fare prescribed in the franchise ordinances granted by the city of Wellsville to the predecessors in title of the defendant railway company and now owned by it.

138 2. In overruling the motion of the Steubenville, East Liverpool and Beaver Valley Traction Company to dismiss the petition and in not sustaining the motion.

3. In holding and adjudging that the city of Wellsville was a proper party to maintain the complaint in equity and in not holding and adjudging that the court was without jurisdiction to entertain the same.

4. In holding and adjudging that the Interstate Commerce Commission was without jurisdiction to enter the order of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092, under the power and authority conferred upon it by the acts to regulate commerce.

5. In holding and adjudging that the Steubenville, East Liverpool and Beaver Valley Traction Company "is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight."

6. In holding and adjudging that the Steubenville, East Liverpool and Beaver Valley Traction Company is not subject to the jurisdiction and regulation of the Interstate Commerce Commission.

7. In permanently annulling, setting aside, and holding for naught the order of the Interstate Commerce Commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

8. In making permanent the preliminary injunction and in permanently enjoining and restraining the Steubenville, East Liverpool & Beaver Valley Traction Company and the Interstate Commerce Commission from putting into effect the order of the commission of November 7, 1921, entitled "Ohio and Pennsylvania Rates, Fares, and Charges," etc., No. 12092.

139 9. In entering the following final decree:

First. That the motions to dismiss the bill in equity and each of them, be, and they are hereby, overruled.

Second. That the order of the Interstate Commerce Commission of November 7, 1921, a copy of which is exhibited with the bill in equity, be, and the same is hereby, annulled, set aside, and held for naught.

Third. That the preliminary injunction heretofore issued out of this court be, and the same is hereby, made permanent; and that the said defendants the Interstate commerce commission and The Steubenville, East Liverpool and Beaver Valley Traction Company and each of them be, and they are hereby, permanently enjoined and restrained from putting into effect the aforesaid order of the Interstate Commerce Commission of November 7, 1921.

Wherefore, defendant prays that the final order or decree of the District Court entered November 20, 1922, be reversed, annulled, and set aside, with directions that the permanent and the preliminary injunctions shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

AGNEW HICE AND T. H. HOGSETT,
Solicitors for the Steubenville, East Liverpool and Beaver Valley Traction Company.

140 In United States District Court

The Steubenville, East Liverpool & Beaver Valley Traction Company, Order allowing appeal, filed December 29, 1922, and entered by Maurice H. Donohue, Circuit Judge, and John M. Killits and D. C. Westenhaver, District Judges.

[Title omitted.]

In the above-entitled cause, the Steubenville, East Liverpool & Beaver Valley Traction Company, defendant, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered November 20, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

It is further ordered that the Steubenville, East Liverpool & Beaver Valley Traction Company shall give bond on appeal in the sum of five hundred ($500) dollars conditioned as required by law and within ten (10) days from the date hereof.

Appeal bond of the Steubenville East Liverpool & Beaver Valley Traction Company for $500.

Filed and approved January 2, 1923.

[Omitted in printing.]

Citation.

[Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 31st day of December, 1922.

JAS. E. AND W. A. O'GRADY,
Solicitor for Appellee.

Citation.

[Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 31st day of December, 1922.

JAS. E. AND W. A. O'GRADY,
Solicitor for Appellee.

144 In United States District Court.

Order extending time for filing transcript of defendants until February 26, 1923, filed and entered by D. C. Westenhaver, Judge.

[Title omitted.]

On application of defendants and for good cause shown, it is ordered that the time for filing the transcript of record in the United States Supreme Court be extended thirty days.

145 [File endorsement omitted.]

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

[Title omitted.]

Præcipe for record.

Filed Jan. 15, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause and include therein, in the order given below, the following:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answers of the Interstate Commerce Commission and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity.
8. Order admitting in evidence certified copies of ordinances of the city of Wellsville numbered 181, 408, 594, 610, and 649, over the objections of counsel for the United States and of counsel for the commission on the issue between plaintiff and the Steuben-
146 ville, East Liverpool and Beaver Valley Traction Company only.
9. Ordinances of the city of Wellsville numbered 181, 408, 594, 610, and 649.
10. Stipulation for record for final hearing.
11. Final decree.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Praecipe for record.
16. Citation on appeal.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

147 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true, and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with the praecipe for transcript filed herein and the originals of which remain in my custody as clerk of said court.

There is also attached to and transmitted herewith, the citation issued and allowed herein.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district this 10th day of February, A. D. 1923, and in the 147th year of the Independence of the United States of America.

B. C. MILLER,
Clerk.

(Indorsed on cover:) File No. 29,421. N. Ohio D. C. U. S. Term No. 229. The United States of America, The Steubenville, East Liverpool and Beaver Valley Traction Company and Interstate Commerce Commission, appellants, *vs.* The City of Wellsville, Ohio. Filed February 23rd, 1923. File No. 29,421.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, Appellants, *v.* THE VILLAGE OF HUBBARD, OHIO.	No. 228.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from the final order or decree of the District Court (Tr. 44) which premanently annulled and enjoined the order of the Interstate Commerce Commission (*Ohio, Rates, Fares, and Charges*, 64 I. C. C. 493, Tr. 18). The proceeding was instituted by the Commission upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company (Tr. 14). The order is one of the great many of a

similar nature which followed *Ex parte 74*. The order is—

> * * * that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased (Tr. 5).

Youngstown and Sharon are situated in Ohio and Pennsylvania, respectively, about 14.5 miles apart. Midway is the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 and 7.18 miles, respectively (Tr. 14). The company operates an electric line between the cities of Youngstown and Sharon which passes through the village of Hubbard. The electric company maintains a regular interurban passenger service every half hour between Youngstown and Sharon (Tr. 15) and additional separate service between Hubbard and Youngstown and Hubbard and Sharon (Tr. 15).

Under franchise ordinance passed by the village of Hubbard in 1901 there was maintained between Hubbard and Sharon a cash fare of 13 cents, and

between Hubbard and Youngstown a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown. Effective February 15, 1920, by tariff duly filed with the Commission, the predecessor electric company increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently, the present electric company, which succeeded the company which had previously established the foregoing fares, filed with the Commission tariff in which it proposed to establish the same fares between Hubbard and Youngstown as those in effect between Hubbard and Sharon, above enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, and the 54-trip commutation ticket between those points from $9 to $10 (Tr. 15). This tariff became effective on interstate travel October 1, 1920, and on November 25, 1920, was adopted by the present electric company. The Public Utilities Commission of Ohio rejected the increase in fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the fran-

chise contracts with the earlier companies which the present company had succeeded (Tr. 16).

The petition on which the order of investigation was based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with interstate fares between Hubbard and Sharon (Tr. 16). Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over the petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown, which is good in either direction, the through fare is defeated by either 5 or 6 cents, according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between

Hubbard and Youngstown. While the company's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted (Tr. 17).

In 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06 as compared with the profit of $18,361.94 between Hubbard and Sharon. The company estimated that in 1921 it would transport 1,897,890 intrastate and 1,180,607 interstate passengers; and that at the present fares the intrastate passenger traffic would yield $162,721 as against $204,808 from the interstate passenger traffic; intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85; under the proposed fares the Youngstown-Hubbard deficit will be turned into a profit of $16,399.25 (Tr. 18).

The electric company has two connections, both east of Hubbard, with the New York Central; and while it does not originate and deliver freight traffic to this line, it received from the New York Central, during the years 1919 and 1920, 922 cars of freight for delivery chiefly at points on the electric company's line. The New York Central forms a connecting link between the line of the electric company and other trunk lines. The electric company also operates a *daily* less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New

Castle Railroad. The electric company also participates with other electric lines in through freight rates from points on its line to Cleveland, Toledo, Detroit, and other points. In 1919 the less-than-carload freight amounted to 6,240 tons, which produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the company for that year. (Tr. 18.)

The interstate fares between Hubbard and Sharon or between Sharon and Youngstown were found to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory (Tr. 19). It was also found that the transportation services were performed under substantially similar circumstances and conditions and that undue prejudice and preference and unjust discrimination should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found reasonable between Hubbard and Sharon.

The District Court held (Circuit Judge Donahue and District Judges Killits and Westenhaver) that the electric company is not an interurban electric railway operated as a part of a general steam railroad system of transportation; nor is it engaged in the

general transportation of freight in addition to its passenger and express business, and, under the interstate commerce act, the Commission was without jurisdiction to hear and determine the controversy. (*Village of Hubbard* v. *United States*, 278 Fed. Rep. 754, Tr. 29, 41.)

II.

POINTS.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

Act to Regulate Commerce, February 4, 1887 (24 Stat. 379).

Act to Regulate Commerce, June 18, 1910 (36 Stat. 539, 552).

Transportation Act of 1920, sec. 422, par. (1) (41 Stat. 488).

Transportation Act of 1920, sec. 402, par. (22) (41 Stat. 478).

Transportation Act of 1920, sec. 439, which added the new sec. 20–a (41 Stat. 494).

Transportation Act of 1920, sec. 209, par. (a) (41 Stat. 464).

Transportation Act of 1920, sec. 300, par. (1) (41 Stat. 469).

The Shreveport Case, 234 U. S. 342, 351.

American Express Co. v. *Caldwell*, 244 U. S. 617, 624.

Wisconsin Railroad Commission v. *C., B. & Q. R. R. Co.*, 257 U. S. 563.

State of New York v. *United States*, 257 U. S. 591.

Lehigh Valley Railroad v. *Public Service Commission*, 272 Fed. Rep. 758.

City of New York v. *United States*, 272 Fed. Rep. 768.

Omaha & Council Bluffs Street Ry. Co. v. *Interstate Commerce Commission*, 230 U. S. 324.

Jurisdiction over Urban Electric Lines, 33 I. C. C. 536, 539.

Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181.

Chesapeake & Potomac Telephone Co. v. *Manning*, 186 U. S. 238, 242, 243.

White v. *United States*, 191 U. S. 545, 551.

Interstate Commerce Commission, v. *Baird*, 194 U. S. 25, 36, 37.

United States v. *Whitridge*, 197 U. S. 135, 143.

United States v. *Falk*, 204 U. S. 143, 149.

Holden v. *Stratton*, 198 U. S. 202, 213.

Tap Line Cases, 234 U. S. 1, 24.

(B) THE FRANCHISE CONTRACTS BETWEEN THE VILLAGE OF HUBBARD AND THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND ITS PREDECESSOR COMPANIES MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

State of New York v. *United States*, 257 U. S. 591.

(C) THE VILLAGE OF HUBBARD IS WITHOUT INTEREST TO MAINTAIN THE BILL.

State of New York v. *United States*, 257 U. S. 591.

City of New York v. *United States*, 272 Fed. Rep. 768.

Lehigh Valley Railroad Co. v. *Public Service Commission*, 272 Fed. Rep. 758.

United States v. *State of Tennessee*, decided May 21, 1923.

Edward Hines Yellow Pine Trustees v. *United States*, No. 91, this Term.

III.

ARGUMENT.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

In form and effect the order of the Commission is similar to those upheld in *The Shreveport Case*, 234 U. S. 342, 351; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768.

If Pennsylvania-Ohio Power & Light Company is subject to the Interstate Commerce Act the decree should be reversed.

In *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it was held that the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 379), did not apply to *street* railroads carrying passengers between cities divided by a State line.

In the opinion of the District Court, District Judge Westenhaver reviewed the several references to electric railways and interurban railways as found in the interstate commerce act (278 Fed. Rep. 763, 764).

Section 12 of the Act approved June 18, 1910, amended Section 15 of the prior act (Ch. 309, 36 Stat. 539, 552) and provided:

> * * * The Commission shall not, however, establish any through route, classification, or rate between *street* electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.

The Congress was well aware that in 1910 and prior thereto interurban electric railways were extensively engaged in the transportation of both passengers and property in interstate commerce. In *Jurisdiction over Urban Electric Lines*, 33 I. C. C. 536, 539, the Commission, in construing the foregoing amendment, said:

> * * * we must continue to hold, with the qualifications resulting from the decision in the *Omaha case*, *supra*, and the amendment to section 15 of the act to regulate commerce, which would exclude "*street* electric passenger railways," that electric railways engaged in interstate transportation are subject to our jurisdiction. In this connection it is worthy of note that electric lines have from time to time requested us to take jurisdiction over them with respect to various matters arising from the application of the interstate-commerce laws.

The reports of the Commission from the earliest until now abound with cases involving the jurisdiction, power, and authority of the Commission over electric urban and interurban railways. That

the Congress took notice thereof in enacting the Transportation Act can not well be gainsaid.[1]

[1] *Chicago & Milwaukee Electric Co.* v. *Illinois Central*, 13 I. C. C. 20; *Cedar Rapids & Iowa City Railway* v. *Chicago Northwestern*, 13 I. C. C. 250; *Southern California Sugar Co.* v. *S. P. L. A. & S. L. R. R. Co.*, 19 I. C. C. 6; *Boyle* v. *Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Beall* v. *Washington, Alexandria & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern*, 20 I. C. C. 486; *Citizens of Somerset* v. *Washington Railway & Electric Co.*, 22 I. C. C. 187; *Silvester* v. *City & Suburban Ry. of Washington*, 22 I. C. C. 201; *Bitzer* v. *Washington-Virginia Ry.*, 24 I. C. C. 255; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; 34 I. C. C. 640; *Virginia Highlands Citizens Association* v. *Washington-Virginia Ry. Co.*, 30 I. C. C. 593; *Milwaukee Produce & Fruit Exchange* v. *Crosby Transportation Co.*, 30 I. C. C. 653; *Damon* v. *Crosby Transportation Co.*, 33 I. C. C. 448; *City of Steubenville* v. *Tri-State Railway and Electric Co.*, 38 I. C. C. 281; *St. Louis, Missouri-Illinois Passenger Fares*, 41 I. C. C. 584; *Lourie Mfg. Co.* v. *Cincinnati Northern*, 42 I. C. C. 448; 49 I. C. C. 64; *Hartford & New York Transportation Co. Joint Rates*, 43 I. C. C. 417; *Aurora, Elgin & Chicago R. R.* v. *Indiana Harbor Belt Line*, 51 I. C. C. 331; *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563; *Hurst* v. *Boise Valley Traction Co.*, 51 I. C. C. 697; *Michigan Ry. Co.* v. *Michigan Central*, 49 I. C. C. 255; *Union Traction Co.* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 281; *Louisville Passenger Fares*, 52 I. C. C. 366; *St. Louis Electric Terminal Ry.* v. *C. C. C. & St. L.*, 55 I. C. C. 52; *Newspapers on passenger cars*, 57 I. C. C. 743; *Badger Lumber Co.* v. *A. T. & S. F. Ry. Co.*, 58 I. C. C. 97; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 135; *Local Fares of Hudson & Manhattan R. R.*, 58 I. C. C. 270; *Electric Railway Mail Pay*, 58 I. C. C. 455; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 647; *Joint Passenger Fares*, 59 I. C. C. 170; *Class & Commodity Rates of Kansas City Railways Co.*, 59 I. C. C. 382; *Cancellation of Joint Through Rates in Connection with the Missouri & Kansas Ry. Co.*, 59 I. C. C. 404; *Local and Joint Passenger Fares*, 59 I. C. C. 430; *Beall* v. *Wheeling Traction Co.*, 60 I. C. C. 600; *Commuters Club* v. *Washington, Baltimore & Annapolis Electric Co.*, 61 I. C. C. 302; *Montana Rates & Fares*, 61 I. C. C. 500; *Intrastate Fares of the Chicago, North Shore & Milwaukee R. R.*, 62 I. C. C. 188; *Fares of Washington-Virginia Ry. Co.*, 60 I. C. C. 200; *City of New Albany, Indiana*, v. *Louisville & Northern Ry. & Lighting Co.*, 64 I. C. C. 468; *In re intrastate rates within the State of Illinois*, 66 I. C. C. 350; *Cancellation of class rates from Indiana to Ohio destinations*, 66 I. C. C. 449; *In re intrastate passenger fares of Chicago, Lake Shore & South Bend Ry. between points in Indiana*, 69 I. C. C. 180; *Providence Fruit and produce Exchange* v. *Rhode Island Co.*, 69 I. C. C. 422; *Buckeye Pipe Line Co.* v. *Baltimore & Ohio*, 73 I. C. C. 19; *Hood Coal Co.* v. *Monongahela Valley Traction Co.*, 73 I. C. C. 54; *Michigan R. R. Co.* v. *Pere Marquette*, 74 I. C. C. 496; *Farmers, etc.*, v. *Fox & Illinois Union Ry.*, 74 I. C. C. 593; *In re intrastate rates within Illinois*, 77 I. C. C. 173.

The Commission reports involving interurban electric railways embrace practically every phase of regulation provided by the interstate commerce act.

The regulation of such companies had increased to such an extent that in the Transportation Act of 1920 the Congress enacted the following provisions.

Transportation Act of 1920, section 422, which added the new section 15–a, paragraph (1) (Ch. 91, 41 Stat. 488):

> When used in this section * * * the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (*a*) sleeping-car companies and express companies, (*b*) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (*c*) *interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and* (*d*) * * *.

Transportation Act of 1920, section 402, paragraph (22) (Ch. 91, 41 Stat. 478):

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transporation.*

Transportation Act of 1920, section 439, which added the new section 20–a (Ch. 91, 41 Stat. 494):

> That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway *which is not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

Transportation Act of 1920, section 209, paragraph (a) (Ch. 91, 41 Stat. 464):

> When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates * * *; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.

Title III of the Transportation Act of 1920 (which creates the Labor Board), Section 300, provides (Ch. 91, 41 Stat. 469):

> When used in this title—
>
> (1) The term "carrier" includes any express company, sleeping-car company, and any carrier by railroad, subject to the Interstate Commerce Act, *except a street, interurban, or*

suburban electric railway not operating as a part of a general steam railroad system of transportation.

"Summarizing and bringing together" these references, the learned District Court said (278 Fed. Rep. 765):

> Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the Commission. These characteristics are: (*a*) Being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission, unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

The learned District Court makes no distinction between *street* electric railways and interurban electric railways, for the same reasoning is applied to both. That Court concedes, however, that if the electric company is "being operated as a part or parts of a general steam railroad system of transportation" or is "engaged in the general business of transporting freight in addition to their passenger and express business" that it is within the Interstate Commerce Act and is subject to the jurisdiction of the Commission. It is respectfully submitted that the electric company has all of these characteristics.

The learned District Court appears to have considered that the *Omaha Case* construed interurban electric companies, such as the one here involved, out of section 1 of the statute before the Act of 1910 and the Transportation Act were passed, and the various exceptions which follow to specific paragraphs in the Transportation Act were emphasis that the latter Acts did not embrace such a carrier.

Whether or not an electric *street* railway is subject to the act is decidedly not the question here. The admitted facts are that the Pennsylvania-Ohio Power & Light Company operates between two States as a common carrier by railroad of both freight and passengers. That brings it within section 1 of the Interstate Commerce Act. If it is within section 1, it can not seriously be argued that anything contained in subsequent exceptions attached to particular sections or paragraphs read it out of the whole act.

In the outset the village of Hubbard questioned the jurisdiction of the Commission. To make certain its power and authority the Commission took the evidence and made the findings which are not in controversy here. The statute does not provide the extent to which the company shall be operating as a part of a general steam railroad system of transportation or the extent to which it shall engage in the general business of transporting freight in addition to passenger and express business.

The learned District Court appears to concede that Congress did not expressly exclude "electric street and interurban railways" except in the specific instances; but the Court urges that the Congress used "other language continuously and consistently" which does exclude *all* electric street or interurban railways which do not possess certain dominant characteristics. Thus the court said (278 Fed. Rep. 768):

> It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not

> thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case.

It very clearly appears that the learned District Court, instead of construing these exceptions as limited to the sections or paragraphs of which they were parts, as the Congress limited them, summarized these exceptions and construed them as applicable to the entire act. That appears to be the fundamental error underlying the whole of the opinion of the District Court. These exceptions should be construed in connection with the specific sections or paragraphs of which they form a part. Interurban electric carriers such as the one here involved were never specifically excepted from the enacting clause of the statute. The "summarizing and bringing together" of the various references to electric railways, including street and urban, are not sufficient to exempt interurban electric railways from the statute.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, this Court, speaking through Mr. Justice Field, said:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be at-

> tached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

See also *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 242, 243; *White* v. *United States*, 191 U. S. 545, 551; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *United States* v. *Whitridge*, 197 U. S. 135, 143; *United States* v. *Falk*, 204 U. S. 143, 149; *Holden* v. *Stratton*, 198, U. S. 202, 213.

The learned District Court then discusses the facts and in the following words disagrees with the Commission (278 Fed. Rep. 768):

> The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation, or was engaged in the general transportation of freight, in addition to its passenger and express business. Plainly and admittedly the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads; but it was independently operated, and not as a part of that system. Its traffic relations with the

> New York Central were limited to receiving over these switches *a few carloads of inbound freight;* and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as these cars were received by the defendant railway.
>
> Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the Commission's report refers thereto as less-than-carload freight; but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. *Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.*

Here the District Court throws out the 922 cars of freight received from the New York Central in 1919 and 1920, the daily interstate less-than-carload freight service, and the three days a week interstate less-than-carload service between Sharon and New Castle, Pa., via Hubbard, Ohio, as well as the participation in through freight rates to Detroit, Cleveland, Toledo, etc.

By the characterization "a few carloads of freight" and "Such an incidental and relatively insignificant and unimportant freight business can not be called

the general transportation of freight in addition to its express business," the District Court clearly substituted its judgment for that of the Commission. Moreover, this freight traffic is substantial and sufficient to bring the company within the law. In *Tap Line Cases*, 234 U. S. 1, 24, this Court said:

> It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts.

(B) THE FRANCHISE CONTRACTS BETWEEN THE VILLAGE OF HUBBARD AND THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND ITS PREDECESSOR COMPANIES MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

After holding, on authorities cited, especially those cases decided by the Supreme Court of Ohio, that the franchise contracts and ordinance grants were binding between the parties, and after observing that the principles of law announced in the decisions of this Court in the *Shreveport Case*, the *Caldwell Case*, and the *Wisconsin Rate Case* may not be applicable to the precise situation here presented,

the learned District Court then stated that the court would not rest on the decisions of those questions but that the case would be disposed of upon the question of the jurisdiction of the Commission over the company.

While the question of the binding effect of the franchise contracts and the ordinance grants is entirely separate from the question of the jurisdiction of the Commission over the company, it is obvious that the bill in equity and the opinion of the District Court treat the two subjects together. Be that as it may, conclusive against the appellee is the recent case of *State of New York* v. *United States*, 257 U. S. 591.

(C) THE VILLAGE OF HUBBARD IS WITHOUT INTEREST TO MAINTAIN THE BILL.

The cases of the *State of New York* v. *United States*, 257 U. S. 591, and *City of New York* v. *United States*, 272 Fed. Rep. 768, would seem to indicate that the village of Hubbard may maintain the present bill. The former case was heard with the *Wisconsin Rate Case* and there was no decision on the question. The case of *City of New York* v. *United States* was dismissed on the authority of *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, and the question of the right of the City of New York to maintain the bill was not decided except by inference.

The only interest the village of Hubbard asserts is the validity of its franchise contracts and ordinance

grants. Under the case of *State of New York* v. *United States*, 257 U. S. 591, their claim is utterly without merit. Similar arguments have been repeatedly overruled and it is now well established that legislative acts, municipal ordinances and orders of State commissions may not prevail against the power of the National Government to regulate interstate commerce. *United States* v. *State of Tennessee*, decided May 21, 1923.

It would therefore seem that the village of Hubbard, notwithstanding the opinion of the District Court, 278 Fed. Rep. 759, is without interest to maintain the proceeding. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this term.

IV.

CONCLUSION.

The Government filed a motion to dismiss the bill (1) for want of interest of the plaintiff in the controversy, and (2) for want of equity (Tr. 21). As the case in the District Court was heard and determined on the face of the bill and the report and order of the Commission were made an exhibit to the bill (Tr. 14), the decree should be reversed and the cause remanded with directions to the District Court to sustain the motion.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 14, 1924.

APPENDIX A.

Section 7 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910, Ch. 309, 36 Stat. 539, 544, amended Section 1 of the Act of 1887, as follows:

> SECTION 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the

transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, de-

livery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

APPENDIX B.

Section 400 of the Transportation Act of 1920 (Ch. 91, 41 Stat. 474), which amended the first four paragraphs of Section 1 of the Interstate Commerce Act as the same appear in Section 7 of the Commerce Court Act, reads as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (*a*) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (*b*) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (*c*) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(*b*) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(*c*) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such trsnsportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated

herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or applicances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE Steubenville, East Liverpool and Beaver Valley Traction Company, and Interstate Commerce Commission, appellants,
v.
THE CITY OF WELLSVILLE, OHIO. } No. 229.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from the final decree of the District Court (Tr. 49) which permanently annulled and enjoined the order of the Interstate commerce Commission (*Ohio and Pennsylvania Rates, Fares, and Charges*, 64 I. C. C. 517, (Tr. 15). The order is one of the many which followed *Ex parte 74*. The proceeding was instituted by the Commission on behalf

of the Steubenville, East Liverpool and Beaver Valley Traction Company (Tr. 7). The order is (Tr. 15):

> * * * that the * * * Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the state of Ohio found in said report to be just and reasonable for the future.

The District Court annulled the order on the ground that the traction company is not an interurban electric railway operating as a part of a general steam railroad system of transportation; nor is it engaged in the general transportation of freight in addition to its passenger and express business, and the Commission was without jurisdiction to hear and determine the controversy. (*The City of Wellsville* v. *United States*, 278 Fed. Rep. 769; *Village of Hubbard* v. *United States*, 278 Fed. Rep. 754; Tr. 33.)

The traction company operates an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, with a local service between certain points within Ohio, and a branch line to Chester, W. Va. Passenger fares only are involved. (Tr. 7.)

The main line is double-tracked and extends along the Ohio River from Vanport west to the Pennsyl-

vania-Ohio State line; thence in a general southerly direction to Steubenville, a distance of 40.2 miles, of which 11.4 miles are in Pennsylvania and 28.8 in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio. (Tr. 8.) The main line was constructed upon a bench cut into the river bluffs or is supported by embankments and in many cases requires extensive masonry and retaining walls. There are also a number of streams entering the Ohio, necessitating expensive construction for bridges and culverts. (Tr. 8.) The traction company has numerous branch lines from East Liverpool and Steubenville. (Tr. 8.)

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville, the passengers changing cars at the diamond in East Liverpool. The company handles no baggage. Daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at the time of the hearing was about once a week. Except for this traffic to Beaver (Tr. 8), the traction company handles only freight local to its line. No freight is handled over the branch lines. The traction company files its tariffs with the Commission and publishes interstate passenger fares between points on its line. (Tr. 9.)

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. As a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport. (Tr. 9.)

The table in the report of the Commission (Tr. 10) shows that the interstate fares between points on the line are considerably more than the intrastate fares, in some instances double, in one instance three and in another four times the amount. The Commission found that these lower intrastate fares had the effect of practically denying to the traction company the use of its interstate fares. Thus, the through interstate fare from Vanport to the terminus at Sixth Street, Steubenville, 40.2 miles, is 90 cents A passenger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then

the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from Steubenville, and examples could be multiplied.

The traffic is very heavy. The number of revenue passengers for the year ended December 31, 1920, was 3,227,652. (Tr. 12.) The traction company asserted that because of the low intrastate fares it was unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon. It shows deficits for 1919 and 1920. (Tr. 12.)

The freight earnings reported in the traction company's annual reports under express were, in 1919, $14,864.79, and in 1920, $23,018.09. (Tr. 13.) The evidence indicates that these freight revenues exceed the freight operating expenses. The Commission did not disturb the intrastate basis of fares in effect on the company's branch or city lines. The Commission did find, however (Tr. 14): "that the interstate passenger fares * * * between Vanport and Sixth Street, Steubenville and intermediate points and designated as 'through service rates' * * * and the interstate passenger fares between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, * * * designated 'local service rates,' are just and reasonable interstate fares for the respective services between those points; and that the mainte-

nance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce, * * *; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce." (Tr. 14.)

The main charges in the bill of complaint are that the Transportation Act of 1920 does not confer or grant the authority claimed by the Commission and the traction company; that if it does grant such power and authority then the statute is unconstitutional in that it would deprive the city and its citizens of property without due process of law and would deprive the city of its right to enter into a franchise contract with any corporation and would set aside valid and binding contracts without due process of law.

On final hearing the District Court made permanent the preliminary injunction previously issued. The United States filed a motion to dismiss the bill (Tr. 16) and on the final hearing it pleaded no further (Tr. 49). The opinion (Tr. 33), *City of Wellsville* v. *United States*, 278 Fed. Rep. 769, adopts and follows the opinion in *Village of Hubbard* v. *United States*, 278 Fed. Rep. 754.

II.

POINTS.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

Act to Regulate Commerce, February 4, 1887 (24 Stat. 379).

Act to Regulate Commerce, June 18, 1910 (36 Stat. 539, 552).

Transportation Act of 1920, sec. 422, par. (1), (41 Stat. 488).

Transportation Act of 1920, sec. 402, par. (22), (41 Stat. 478).

Transportation Act of 1920, sec. 439, which added the new sec. 20–a (41 Stat. 494).

Transportation Act of 1920, sec. 209, par. (a) (41 Stat. 464).

Transportation Act of 1920, sec. 300, par. (1) (41 Stat. 469).

The Shreveport Case, 234 U. S. 342, 351.

American Express Co. v. *Caldwell*, 244 U. S. 617, 624.

Wisconsin Railroad Commission v. *C., B. & Q. R. R. Co.*, 257 U. S. 563.

State of New York v. *United States*, 257 U. S. 591.

Lehigh Valley Railroad v. *Public Service Commission*, 272 Fed. Rep. 758.

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Chesapeake & Potomac Telephone Co. v. *Manning*, 186 U. S. 238, 242, 243.

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Holden v. *Stratton*, 198 U. S. 202, 213.

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Tap Line Cases, 234 U. S. 1, 24.

(B) THE FRANCHISE CONTRACTS BETWEEN THE CITY OF WELLSVILLE AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

State of New York v. *United States*, 257 U. S. 591.

(C) THE CITY OF WELLSVILLE IS WITHOUT INTEREST TO MAINTAIN THE BILL.

State of New York v. *United States*, 257 U. S. 591.

City of New York v. *United States*, 272 Fed. Rep. 768.

Lehigh Valley Railroad Co. v. *Public Service Commission*, 272 Fed. Rep. 758.

United States v. *State of Tennessee*, decided May 21, 1923.

Edward Hines Yellow Pine Trustees v. *United States*, No. 91, this Term.

III.

ARGUMENT.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

In form and effect the order of the Commission is similar to those upheld in *The Shreveport Case*, 234 U. S. 342, 351; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768.

If the Steubenville, East Liverpool & Beaver Valley Traction Company is subject to the Interstate Commerce Act the decree should be reversed.

In *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it was held that the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 379), did not apply to *street* railroads carrying passengers between cities divided by a State Line.

In the opinion of the District Court, District Judge Westenhaver reviewed the several references to electric railways and interurban railways as found in the Interstate Commerce Act (278 Fed. Rep. 763, 767).

Section 12 of the Act approved June 18, 1910, amended Section 15 of the prior act (ch. 309, 36 Stat. 539, 552) and provided:

> * * * The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.

The Congress was well aware that in 1910 and prior thereto interurban electric railways were extensively engaged in the transportation of both passengers and property in interstate commerce. In *Jurisdiction Over Urban Electric Lines*, 33 I. C. C. 536, 539, the Commission, in construing the foregoing amendment, said:

> * * * we must continue to hold, with the qualifications resulting from the decision in the *Omaha case, supra*, and the amendment to section 15 of the act to regulate commerce, which would exclude "street electric passenger railways," that electric railways engaged in interstate transportation are subject to our jurisdiction. In this connection it is worthy of note that electric lines have from time to time requested us to take jurisdiction over them with respect to various matters

arising from the application of the interstate-commerce laws.

The reports of the Commission from the earliest until now abound with cases involving the jurisdiction, power, and authority of the Commission over electric urban and interurban railways. That the Congress took notice thereof in enacting the Transportation Act can not well be gainsaid.[1]

[1] *Chicago & Milwaukee Electric Co.* v. *Illinois Central*, 13 I. C. C. 20; *Cedar Rapids & Iowa City Railway* v. *Chicago North Western*, 13 I. C. C. 250; *Southern California Sugar Co.* v. *S. P. L. A. & S. L. R. R. Co.*, 19 I. C. C. 6; *Boyle* v. *Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Beall* v. *Washington, Alexandria & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern*, 20 I. C. C. 486; *Citizens of Somerset* v. *Washington Railway & Electric Co.*, 22 I. C. C. 187; *Silvester* v. *City & Suburban Ry. of Washington*, 22 I. C. C. 201; *Bitzer* v. *Washington-Virginia Ry.*, 24 I. C. C. 255; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; 34 I. C. C. 640; *Virginia Highlands Citizens Association* v. *Washington-Virginia Ry. Co.*, 30 I. C. C. 593; *Milwaukee Produce & Fruit Exchange* v. *Crosby Transportation Co.*, 30 I. C. C. 653; *Damon* v. *Crosby Transportation Co.*, 33 I. C. C. 448; *City of Steubenville* v. *Tri-State Railway and Electric Co.*, 38 I. C. C. 281; *St. Louis, Missouri-Illinois Passenger Fares*, 41 I. C. C. 584; *Lourie Mfg. Co.* v. *Cincinnati Northern*, 42 I. C. C. 448; 49 I. C. C. 64; *Hartford & New York Transportation Co. Joint Rates*, 43 I. C. C. 417; *Aurora, Elgin & Chicago R. R.* v. *Indiana Harbor Belt Line*, 51 I. C. C. 331; *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563; *Hurst* v. *Boise Valley Traction Co.*, 51 I. C. 697; *Michigan Ry. Co.* v. *Michigan Central*, 49 I. C. C. 255; *Union Traction Co.* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 281; *Louisville Passenger Fares*, 52 I. C. C. 366; *St. Louis Electric Terminal Ry.* v. *C. C. C. & St. L.*, 55 I. C. C. 52; *Newspapers on passenger cars*, 57 I. C. C. 743; *Badger Lumber Co.* v. *A., T. & S. F. Ry. Co.*, 58 I. C. C. 97; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 135; *Local Fares of Hudson & Manhattan R. R.*, 58 I. C. C. 270; *Electric Railway Mail Pay*, 58 I. C. C. 455; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 647; *Joint Passenger Fares*, 59 I. C. C. 170; *Class & Commodity Rates of Kansas City Railways Co.*, 59 I. C. C. 382; *Cancellation of Joint Through Rates in Connection with the Missouri & Kansas Ry. Co.*, 59 I. C. C.404; *Local and Joint Passenger Fares*, 59 I. C. C. 430; *Beall v. Wheeling Traction Co.*, 60 I. C. C. 600;

The Commission's reports involving interurban electric railways embrace practically every phase of regulation provided by the Interstate Commerce Act.

The regulation of such companies had increased to such an extent that in the Transportation Act of 1920 the Congress enacted the following provisions:

Transportation Act of 1920, section 422, which added the new section 15–a, paragraph (1) (Ch. 91, 41 Stat. 488):

> When used in this section * * * the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) *interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight*, and (d) * * *.

Commuters Club v. *Washington, Baltimore & Annapolis Electric Co.*, 61 I. C. C. 302; *Montana Rates & Fares*, 61 I. C. C. 500; *Intrastate Fares of the Chicago, North Shore & Milwaukee R. R.*, 62 I. C. C. 188; *Fares of Washington-Virginia Ry. Co.*, 60 I. C. C. 200; *City of New Albany, Indiana*, v. *Louisville & Northern Ry. & Lighting Co.*, 64 I. C. C. 468; *In re intrastate rates within the State of Illinois*, 66 I. C. C. 350; *Cancellation of class rates from Indiana to Ohio destinations*, 66 I. C. C. 449; *In re intrastate passenger fares of Chicago, Lake Shore & South Bend Ry. between points in Indiana*, 69 I. C. C. 180; *Providence Fruit and Produce Exchange* v. *Rhode Island Co.*, 69 I. C. C. 422; *Buckeye Pipe Line Co.* v. *Baltimore & Ohio*, 73 I. C. C. 19; *Hood Coal Co. v. Monongahela Valley Traction Co.*, 73 I. C. C. 54; *Michigan R. R. Co.* v. *Pere Marquette*, 74 I. C. C. 496; *Farmers, etc.*, v. *Fox & Illinois Union Ry.*, 74 I. C. C. 593; *In re intrastate rates within Illinois*, 77 I. C. C. 173.

Transportation Act of 1920, section 402, paragraph (22) (Ch. 91, 41 Stat. 478):

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*

Transportation Act of 1920, section 439, which added the new section 20–a (Ch. 91, 41 Stat. 494):

> That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway *which is not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

Transportation Act of 1920, section 209, paragraph (a) (Ch. 91, 41 Stat. 464):

> When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, * * *; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its

> principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.

Title III of the Transportation Act of 1920 (which created the Labor Board), Section 300, provides (Ch. 91, 41 Stat. 469):

> When used in this title—
>
> (1) The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, *except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation.*

Summarizing and bringing together these references the learned District Court in the *Hubbard Case* said (278 Fed. Rep. 765):

> Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the Commission. These characteristics are: (*a*) Being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from

> the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission, unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

The learned District Court makes no distinction between *street* electric railways and interurban electric railways, and the same reasoning is applied to both. That Court concedes, however, that if the traction company is "being operated as a part or parts of a general steam railroad system of transportation" or is "engaged in the general business of transporting freight in addition to their passenger and express business" that it is within the Interstate Commerce Act and is subject to the jurisdiction of the Commission. It is respectfully submitted that the traction company has all of these characteristics.

The learned District Court appears to have considered that the *Omaha Case* construed interurban electric companies such as the one here involved out of section 1 of the statute before the Act of 1910 and the Transportation Act were passed, and the various exceptions which follow to specific paragraphs in the Transportation Act were emphasis that the latter Acts did not embrace such a carrier.

Whether or not an electric *street* railway is subject to the act is decidedly not the question here. The admitted facts are that the Steubenville, East Liverpool & Beaver Valley Traction Co. operates between two States as a common carrier by railroad of both freight and passengers. That brings it within section 1 of the Interstate Commerce Act. If it is within section 1 it can not seriously be argued that anything contained in subsequent exceptions attached to particular sections or paragraphs read it out of the whole act.

To make certain its power and authority the Commission took the evidence and made the findings which are not in controversy here. The statute does not provide the extent to which the company shall be operating as a part of a general steam railroad system of transportation or the extent to which it shall engage in the general business of transporting freight in addition to passenger and express business.

The learned District Court appears to concede that Congress did not expressly exclude "electric street and interurban railways" except in the specific instances; but the Court urges that the Congress used "other language continuously and consistently" which does exclude *all* electric street or interurban railways which do not possess certain dominant characteristics. Thus the court in the *Hubbard case* said (278 Fed. Rep. 768):

> It is true that Congress, in excluding electric street and interurban railways, did not use

> this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway Case.

It very clearly appears that the learned District Court, instead of construing these exceptions as limited to the sections or paragraphs of which they were parts, as the Congress limited them, summarized these exceptions and construed them as applicable to the entire act. That appears to be the fundamental error underlying the whole of the opinion of the District Court. These exceptions should be construed in connection with the specific sections or paragraphs of which they form a part. Interurban electric carriers such as the one here involved were never specifically excepted from the enacting clause of the statute. The "summarizing and bringing together" of the various references to electric railways, including street and urban, are not sufficient to exempt interurban electric railways from the statute.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, this Court, speaking through Mr. Justice Field, said:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

See also *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 242, 243; *White* v. *United States*, 191 U. S. 545, 551; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *United States* v. *Whitridge*, 197 U. S. 135, 143; *United States* v. *Falk*, 204 U. S. 143, 149; *Holden* v. *Stratton*, 198 U. S. 202, 213.

In *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563, the cities of East Liverpool, Ohio, and Chester, W. Va., as complainants, invoked the jurisdiction of the Interstate Commerce Commission against this traction company and attacked the interstate passenger fares. In sustaining its jurisdiction on the complaint of those municipalities, the Commission said (p. 565):

It is argued by counsel for the city of East Liverpool that the Chester line is in fact a street passenger railway falling within that class of street railways which are excluded from the operation of the interstate commerce act under the decision of the Supreme Court of the United States in *Omaha Street Ry.* v. *Int. Com. Comm.* 230 U. S. 324. It appears that this property was originally incorporated under the laws of West Virginia as a street railway, but it is now operated as a part of an interstate carrier. The Steubenville, East Liverpool & Beaver Valley Traction Company owns 42.12 miles of road in Ohio, 11.2 miles in Pennsylvania, and 2.09 miles in West Virginia, as shown by the annual reports of the merged companies. It transports freight and passengers over its main line between Steubenville and Vanport, but does not handle commercial freight over the Chester branch. It files its tariffs with the Commission and publishes through passenger fares between Chester and all points in Ohio and Pennsylvania which it serves, and at times operates cars from its Pennsylvania stations through to Chester. It is subject to the provisions of the act to regulate commerce. *Jurisdiction over Urban Electric Lines*, 33 I. C. C. 536; *City of Steubenville, Ohio*, v. *Tri-State R. & E. Co.*, 38 I. C. C. 281. The Chester branch is an integral part of defendant's railway, and the interstate fares thereover are within the control and regulation of the Commission.

The Wheeling Traction Company, referred to in the report of the Commission (64 I. C. C. 519), on

complaint of passengers representing the traveling public, has also been held to be subject to the interstate commerce act (*Beall* v. *Wheeling Traction Co.*, 60 I. C. C. 600).

As in the case of *Village of Hubbard* v. *United States*, the District Court gave no heed to the general freight business which the traction company conducted and treated it as of even less significance.

By the characterization in the *Hubbard Case* "a few carloads of freight" and "such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business," the District Court clearly substituted its judgment for that of the Commission. Moreover, the freight traffic in the instant case is substantial and sufficient to bring the company within the law. In *Tap Line Cases*, 234 U. S. 1, 24, this Court said:

> It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts.

(B) THE FRANCHISE CONTRACTS BETWEEN THE CITY OF WELLSVILLE AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

After holding, on authorities cited, especially those cases decided by the Supreme Court of Ohio, that the franchise contracts and ordinance grants were binding between the parties, and after observing that the principles of law announced in the decisions of this Court in the *Shreveport Case*, the *Caldwell Case*, and the *Wisconsin Rate Case*, may not be applicable to the precise situation here presented, the learned District Court then stated that the court would not rest on the decisions of those questions but that the case would be disposed of upon the question of the jurisdiction of the Commission over the company.

While the question of the binding effect of the franchise contracts and the ordinance grants is entirely separate from the question of the jurisdiction of the Commission over the company, it is obvious that the bill in equity and the opinion of the District Court treat the two subjects together. Be that as it may, conclusive against the appellee is the recent case of *State of New York* v. *United States*, 257 U. S. 591.

(C) THE CITY OF WELLSVILLE IS WITHOUT INTEREST TO MAINTAIN THE BILL.

The cases of the *State of New York* v. *United States*, 257 U. S. 591, and *City of New York* v. *United States*, 272 Fed. Rep. 768, would seem to indicate that the City of Wellsville may maintain the present bill. The former case was heard with the *Wisconsin Rate Case*, and there was no decision on the question. The case of *City of New York* v. *United States* was dismissed on the authority of *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, and the question of the right of the City of New York to maintain the bill was not decided except by inference.

The only interest the City of Wellsville asserts is the validity of its franchise contracts and ordinance grants. Under the case of *State of New York* v. *United States*, 257 U. S. 591, their claim is utterly without merit. Similar arguments have been repeatedly overruled, and it is now well established that legislative acts, municipal ordinances, and orders of State commissions may not prevail against the power of the National Government to regulate interstate commerce. *United States* v. *State of Tennessee*, decided May 21, 1923.

It would therefore seem that the City of Wellsville, notwithstanding the opinion of the District Court, 278 Fed. Rep. 769, is without interest to maintain the proceeding. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this Term.

IV.

CONCLUSION.

The Government filed a motion to dismiss the bill (1) for want of interest of the plaintiff in the controversy and (2) for want of equity (Tr. 16). As the case in the District Court was heard and determined on the face of the bill and the report and order of the Commission were made an exhibit to the bill (Tr. 7), the decree should be reversed and the cause remanded with directions to the District Court to sustain the motion.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 14, 1924.

APPENDIX A.

Section 7 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910, Ch. 309, 36 Stat. 539, 544, amended Section 1 of the Act of 1887, as follows:

> SECTION 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the

transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, de-

livery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

APPENDIX B.

Section 400 of the Transportation Act of 1920 (Ch. 91, 41 Stat. 474), which amended the first four paragraphs of Section 1 of the Interstate Commerce Act as the same appear in Section 7 of the Commerce Court Act, reads as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (*a*) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (*b*) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (*c*) The transmission of intelligence by wire or wireless; from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(*b*) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(*c*) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act, shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated

herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

NOS. 25 AND 26

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Pennsylvania Power & Light Company, appellants

v.

THE VILLAGE OF HUBBARD, OHIO, APPELLEE

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, appellants

v.

THE CITY OF WELLSVILLE, OHIO, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Are the two companies named within the Interstate Commerce Act and subject to regulation by the Commission? and if so, May the franchise ordinances

granted by the municipalities to the companies prevail against the orders of the Interstate Commerce Commission? are the questions (64 I. C. C., 493; 64 I. C. C. 517).

I

In the original bills in equity neither of the appellees raised the question that either company was not subject to the Interstate Commerce Act. In each case the foundation of the bill was that the order of the Commission may not overthrow the franchise ordinances.

On the question of the validity of the franchise ordinances the learned District Court said (No. 25, Tr. 34; No. 26, Tr. 39; 278 Fed. Rep. 754, 761), "* * * we pass without deciding the questions raised and argued on this contention of plaintiff, for the reason that we are content to dispose of the case upon a consideration of plaintiff's other contention."

The learned District Court then proceeded to annul the orders on the ground that the two appellant companies were without the Interstate Commerce Act.

In the amendment on the face of the bill (Tr. 6) in the *Hubbard Case*, No. 25, the allegation was inserted that the company (a) is not a common carrier, (b) is not an interurban electric railway operated as a part of a general steam railway system of transportation (c) nor is it engaged in the general transportation of freight. There is an earlier allegation (Tr. 2) that the company "owns and operates an

electric street railway." There is no allegation that the company is not engaged in the general business of carrying passengers in interstate commerce.

In the *Wellsville Case,* No. 26, it is specifically alleged that the company "is a common carrier of passengers for hire." (Tr. 1.)

The findings of the Commission disclose that these two companies hold themselves out to carry both freight and passengers and that they do actually carry both.

The decisions conclusively adjudicate that if carriers hold themselves out to and actually do carry freight and passengers, or either, they are within the terms of the statute regardless of the extent to which they carry or of the volume of the business.

The mandate is "That the provisions of this act shall apply to common carriers engaged in—

"The transportation of passengers *or* property wholly by railroad," etc.

"The transportation of oil *or* other commodity by pipe line," etc.

"The transmission of intelligence by wire *or* wireless," etc.

The mandate further is, "The provisions of this act shall also apply to such transportation of passengers *and* property *and* transmission of intelligence * * * but shall not apply—

"To the transportation of passengers *or* property, or to the receiving, delivery, storage, or handling of property wholly within one State," etc.

"To the transmission of intelligence by wire *or* wireless wholly within one State," etc.

"To the transportation of passengers *or* property by a carrier by water," etc.

The all-embracing provisions are that the act shall apply to *common carriers* engaged in "the *transportation* of passengers *or* property," and the provisions of the act shall also apply to "*such* transportation of passengers *and* property."

The failure to allege that the companies are not engaged in the carriage of passengers in interstate commerce renders the bills fatally defective in the face of the findings of the Commission. The two carriers are clearly engaged in the carriage of both passengers and freight, and it is sufficient if they carry or hold themselves out to carry either.

In the *Hubbard case,* No. 25, the amendment to the bill alleges that the company "is not a common carrier." (Tr. 6.) But the whole controversy arises over the fact that these companies are common carriers of passengers and that the interstate traffic must bear the burden resulting from the franchise ordinance lower intrastate rates. The interstate rates are published and collected in accordance with tariffs duly filed with the Commission and have been sustained as reasonable.

In *Tap Line Cases,* 234 U. S. 1, 24, 26, this Court, speaking through Mr. Justice Day, after citing authorities, laid down the broad proposition, "the extent to which a railroad is in fact used does not

determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character. * * * They (the tap lines) are engaged in carrying for hire the goods of those who see fit to employ them."

In *Terminal Taxicab Company* v. *District of Columbia*, 241 U. S. 252, the question was whether the taxicab company was a common carrier under the definition in the act which provided that every "public utility embraces every common carrier * * * controlling or managing any agency or agencies for public use for the *conveyance of persons or property* within the District of Columbia for hire." In holding the taxicab company subject to the jurisdiction of the Public Utilities Commission this Court, speaking through Mr. Justice Holmes, said, "It does business in the District, and the important thing is what it does, not what its charter says," and "No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts." Citing *Peck* v. *Chicago Tribune*, 214 U. S. 185, 190, Mr. Justice Holmes also said: "The public does not mean everybody all the time." (241 U. S. 255.)

In *Pacific Spruce Corporation* v. *McCoy*, 294 Fed. Rep. 711, 714, District Judge Wolverton, in an elaborate opinion which considered many cases, including the foregoing, said, "It is not essential for

constituting the utility a common carrier that it carry both passengers and freight, or that it carry all kinds of freight."

Tested by these principles, the two appellant companies are subject to the Interstate Commerce Act. The act itself provides the exceptions to which they are entitled when the circumstances warrant, as pointed out in the *Omaha Street Railway case*, 230 U. S. 324, 336.

Interurban electric railways have been regulated by the Interstate Commerce Commission almost from the time of its creation and the Congress had knowledge of that regulation when repeatedly enacting new legislation.[1]

> *Jurisdiction over Urban Electric Railways*, 33 I. C. C. 536.
>
> *St. Louis, Mo.–Illinois Passenger Fares*, 41 I. C. C. 584.

In *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Company*, 51 I. C. C. 563, the City itself invoked the jurisdiction of the Commission against one of these appellants; at least the City appears as the only complainant in the case.

In re Intrastate Fares, Chicago, North Shore & Milwaukee Railroad Company, 62 I. C. C. 188, 193, the *Omaha Street Railways Case* was distinguished.

In re Intrastate Rates within the State of Illinois, 66 I. C. C. 350, in a supplemental hearing the Commission considered the relation of the passenger

[1] See Appendix A, p. 15.

fares authorized by *Ex parte 74* and the intrastate rates and charges of electric railroads in Illinois.

This case is precisely what this Court held the Omaha Street Railway was not, as in that case this Court, speaking through Mr. Justice Lamar, said:

> But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. *We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight.* 230 U. S. 337.

II

That the paramount power of Congress through its appropriate agency to regulate interstate commerce may not be obstructed by State or municipal authority would seem also to be well settled by the recent decisions.

(*a*) *The paramount power of Congress*

In *Houston, East & West Texas Railway* v. *United States*, 234 U. S. 342, 350, 351, 352, this Court, speaking through Mr. Justice Hughes, said:

> First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to

regulate commerce among the several States. It is of the essence of this power that where it exists it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, *supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to

control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases, supra*, pp. 48, 51;

Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473.

In *Wisconsin Commission* v. *Chicago, Burlington & Quincy*, 257 U. S. 563, 588, this Court, speaking through Mr. Chief Justice Taft, said:

> It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, can not exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.

(b) *The Finding of the Commission that "Undue prejudice, undue preference and advantage, and unjust discrimination" exist is conclusive*

In *United States* v. *Tennessee*, 262 U. S. 318, 322, 323, this Court, speaking through Mr. Justice Brandeis, said:

> Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue, or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice or disadvantage to some other person, commodity, or locality, or to interstate commerce.
>
> * * * * *
>
> The grant of a lower rate on road material to a government engaged in highway construction may benefit the government without subjecting to prejudice any person, locality, or class of traffic. But a lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be

> prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission was expressly found by the Interstate Commerce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

(c) *The franchise ordinances may not overthrow the orders of the Commission*

In *New York* v. *United States*, 257 U. S. 591, 600, 601, the main argument of the State was that the New York Central Railroad was operating under a charter contract and only by abandoning its charter might it avoid the two-cent fare. Rejecting the argument *in toto*, and following the *Wisconsin Rate case*, this Court, speaking through Mr. Chief Justice Taft, said:

> The next objection is that the State has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that if the Transportation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of §10, Article I, of the Federal Constitution. That section provides that "no *State* shall * * * pass any * * * law impairing the obligation of contracts," and does not in its terms

> restrict Congress or the United States. But it is said that it deprives New York and her people of property without due process of law. We said in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 230, "Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467. See also *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400.

The language of the Chief Justice was not *obiter dictum*. It was the direct, forceful, and conclusive adjudication of the main question raised in the issues made by the parties and which formed the very foundation of the suit.

The New York Central Railroad accepted its legislative charter on the condition that the passenger fares should not exceed two cents per mile. The Interstate Commerce Commission found that undue preference and unjust discrimination was created by reason of the two-cent fare. The Federal power to direct the removal of those preferences and discriminations was vigorously sustained.

The instant cases are in all respects similar. Undue preference and unjust discrimination has been found by appropriately constituted and designated authority after full hearing. If the franchise ordi-

nances are held to supersede the power of the Commission, then the so-called *New York Case* must be overruled as it may not be distinguished.

States and municipalities may not fix rates whether agreed to by the carriers or not which obstruct the Federal power.

III

In each case the decree of the District Court should be reversed with directions to dismiss the bill for want of equity.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

NOVEMBER 1, 1924.

APPENDIX A

(Ante, p. 6)

7 I. C. C. 83, *Rock Creek Railway*, a trolley line operating between Washington and Chevy Chase Lake, Maryland, held subject to the act.

13 I. C. C. 20, *Chicago & Milwaukee Electric Railroad*, an interurban electric railway carrying both freight and passengers, held subject to the act to regulate commerce; through routes and rates with connecting trunk lines denied on ground that satisfactory through routes already existed. "The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction."

13 I. C. C. 250, *Cedar Rapids & Iowa City Railway & Light Company*, a single-track railroad of standard gauge, operated by electricity, and which carried both freight and passengers, held subject to act and through joint rates directed, citing *Chicago & Milwaukee Electric* case.

19 I. C. C. 6, *Pacific Electric Railway*, a standard-gauge road with an aggregate mileage of 313 miles and ample equipment for the carriage of freight and passengers, denied through routes and joint rates with trunk lines on the ground that satisfactory through routes already existed.

20 I. C. C. 232, *Great Falls & Old Dominion Railroad*, an electric or trolley line 15 miles in length, treated as subject to the act and complaint attacking commutation fares dismissed on the merits.

20 I. C. C. 406, *Washington, Alexandria & Mt. Vernon Railway*, an electric railway company en-

gaged in the transportation of passengers and property between points in Virginia and Washington, treated as subject to the act and certain single-trip passenger fares condemned.

20 I. C. C. 486, *Cincinnati & Columbus Traction*, an interurban electrically operated line, found entitled to a switching connection with the Baltimore & Ohio and Norfolk & Western companies. (Order annulled, see *Baltimore & Ohio Southwestern Railroad Company* v. *United States*, 226 U. S. 14.)

22 I. C. C. 187, *Washington Railway & Electric* again held subject to act and certain increases in passenger fares were denied.

22 I. C. C. 201, *City & Suburban Railway of Washington*, which operated an electric line between Washington and Laurel, Md., a distance of 18.9 miles, held subject to act with respect to passenger traffic and ordered to comply with the provisions of statute respecting the filing and posting of tariffs.

24 I. C. C. 255, *Washington-Virginia Railway*, which operates a system of electric lines between Washington and Virginia points, treated as subject to the act and numerous passenger fares condemned, with directions that the company shall readjust its tariffs.

27 I. C. C. 499, *Indianapolis, Columbus & Southern Traction*, an interurban electrically operated railway carrying both freight and passengers, allowed through routes with connecting trunk lines. 34 I. C. C. 640, divisions established of joint rates maintained over the through routes of *Indianapolis, Columbus & Southern Traction*.

30 I. C. C. 593, *Washington-Virginia Railway* found guilty of discrimination in the application of commutation passenger fares between Washington and certain Virginia points.

30 I. C. C. 653, *Grand Rapids, Grand Haven & Muskegon Railway,* an electric line, allowed joint rates with the Crosby Transportation Company, a water line.

33 I. C. C. 448, *Grand Rapids, Grand Haven & Muskegon Railway,* an electric line carrying both freight and passengers, found discriminated against when through tickets were sold by trunk lines over other than its lines.

38 I. C. C. 281, *Tri-State Railway & Electric,* which appears to be a passenger-carrying line only within a very limited area, although between Ohio and West Virginia, was treated as subject to regulation by the Commission and certain fares were condemned as unreasonable.

41 I. C. C. 584, *Illinois Traction System,* composed of interurban electrically operated railways and carrying both freight and passengers, was treated as subject to the act; the *Omaha Street Railway Case,* 230 U. S. 324, was distinguished, and it was held that interstate fares prescribed by a municipal ordinance are not conclusively presumed to be reasonable, even if accepted by the interstate carrier as one of the conditions of a franchise.

42 I. C. C. 448, *Illinois Traction System,* again treated as subject to the jurisdiction of the Commission. See also 49 I. C. C. 64.

43 I. C. C. 417, *Hartford & New York Transportation Company,* an electric line operating almost wholly within Rhode Island, sought a readjustment of local interstate class and commodity rates by proposing to increase certain rates and to reduce others. The Commission found the proposed rates were justified.

49 I. C. C. 255, *Michigan Railway Company,* which operated an electric line between Grand Rapids and Kalamazoo, undertook to compel "through ticketing

of passengers and through checking of baggage between Grand Rapids and Chicago." The relief was denied on the merits and not for lack of jurisdiction.

51 I. C. C. 331, *Aurora, Elgin & Chicago Railroad*, an electric railway line extending from Chicago to Elgin and Aurora and carrying principally passengers but also conducting some freight business, made complaint of unreasonable charges for switching by connecting lines, which was denied on the merits.

51 I. C. C. 697, *Boise Valley Traction*, an electric traction line operating within the State of Idaho, complained of undue prejudice on account of rates in excess of the blanket rates in surrounding territory. Complaint sustained. The jurisdiction of the Commission appears to have been assumed.

52 I. C. C. 281, *Union Traction Company*, an interstate common carrier with 73 miles of standard-gauge main line equipped for electrical operation, denied through routes and joint class and commodity rates with trunk lines without any question of the jurisdiction of the Commission.

52 I. C. C. 366, *Louisville & Southern Indiana Traction Company* and *Louisville & Northern Railway & Lighting Company*, interurban electric railways operating between Louisville, Ky., and Jeffersonville, Ind., and Louisville and New Albany, Ind., respectively, sought to increase their passenger fares from 5 cents to 10 cents with provision for sale of commutation tickets at 7 cents per trip. With much opposition in which the question of jurisdiction was not raised, the Commission fixed the fare at 7 cents per trip.

55 I. C. C. 52, *St. Louis Electric Terminal Railway*, together with other lines comprising the Illinois

Traction System, consisting of about 425 miles of electric railroads, granted through routes for the transportation of freight, except coal, from and to points on the lines of New York Central Railroad.

57 I. C. C. 743, *Kansas City, Kaw Valley & Western Railway*, an electric line about 40 miles in length, extending from Kansas City, Mo., to Lawrence, Kan., denied an increase of rates on newspapers carried on passenger cars. The question of the jurisdiction of the Commission does not appear to have been raised.

58 I. C. C. 97, *Kansas City Railways Company*, an electric line which operated a belt extending from Dodson, Mo., into the section of the city of Kansas City, Mo., known as Westport, a distance of 8 miles, made application to increase freight rates on the belt, which was granted, without question being raised of jurisdiction.

58 I. C. C. 135, *Chicago, Lake Shore & South Bend Railway*, a standard-gauge electrically operated line between Chicago and South Bend, a distance of about 75 miles, and engaged mainly in the transportation of passengers, failed to sustain its complaint alleging discrimination on the part of trunk lines for failure to interchange traffic.

58 I. C. C. 270, *Hudson & Manhattan Railroad*, an electric railroad operated between New York City and Jersey City and Hoboken, was denied an increase to 8 cents in its interstate passenger fare of 6 cents between the two points named and Hudson Terminal, New York.

58 I. C. C. 455, the Commission in a very elaborate report established the pay of electric railway lines for carrying the mails.

58 I. C. C. 647, *Chicago, Lake Shore & South Bend Railway*, an electrically operated standard-gauge rail-

road and a common carrier of passengers and freight, granted through routes and joint rates with certain trunk-line connections.

59 I. C. C. 170, *Interstate Consolidated Street Railway Company* and *Rhode Island Company*, electric lines operating between certain points in Massachusetts and Rhode Island, permitted to publish and file tariffs of interstate fares.

59 I. C. C. 382, *Kansas City Railways Company*, an electric line operating between Dodson, Mo., and Kansas City, Mo., 8 miles, authorized to increase class and commodity rates over protests of shippers.

59 I. C. C. 404, *The Strang Line*, an electric railroad carrying both freight and passengers, successfully protested against tariffs of connecting lines which sought to cancel joint rates on various commodities.

59 I. C. C. 430, *Wheeling Traction Company*, treated as subject to the act and directed to cancel certain interstate passenger fares and schedules between points on its line.

60 I. C. C. 600, *Wheeling Traction Company*, which operates an electric railroad system in Ohio and West Virginia, adjudged guilty of preference and discrimination in maintaining rates for intrastate passengers lower than those for interstate passengers. In its report the Commission said: "Our jurisdiction over the Traction Company is not questioned."

61 I. C. C. 302, *Washington, Baltimore & Annapolis Electric Railroad*, an electric railroad operating 55 miles of line between Washington, Baltimore, and Annapolis with trackage agreements over the lines of other carriers, including the Washington Railway & Electric Company, with freight constituting but a

small portion of its traffic, treated as subject to the act and its interstate fares sustained as reasonable.

62 I. C. C. 188, *Chicago, North Shore & Milwaukee Railroad,* an interurban electric line which operates between Chicago and Milwaukee and intermediate points, treated as subject to the act and found to discriminate against interstate passengers by maintaining higher fares between interstate points than between intrastate points for similar distances.

62 I. C. C. 200, *Washington-Virginia Railway,* treated as subject to the act and certain increases in commutation fares approved in part.

64 I. C. C. 468, *Louisville & Northern Railway & Lighting Company* treated as subject to the act and passenger fares between Louisville and New Albany, Indiana, condemned; reasonable rates prescribed.

66 I. C. C. 449, *Terre Haute, Indianapolis & Eastern Traction Company, Dayton & Western Traction Company,* and other traction companies, treated as subject to the act and tariffs proposing certain increases in schedules of passenger fares ordered canceled.

66 I. C. C. 350, interstate rates and charges of electric railroads found to be unduly preferential of intrastate traffic and localities within the State and unduly prejudicial to interstate traffic and localities without the State. Previous reports, 59 I. C. C. 350; 60 I. C. C. 92.

69 I. C. C. 180, *Chicago, Lake Shore & South Bend Railway,* an electric line, increased its interstate fares under *Ex parte 74,* 58 I. C. C. 220. Lower intrastate fares found to discriminate against higher interstate fares and discrimination ordered removed.

69 I. C. C. 422, *Rhode Island Company,* which operates by electricity on the public streets of

Providence, performs a switching service, a passenger service, and a so-called trolley freight service. Practice of New Haven Railroad in refusing to absorb switching charges of Rhode Island Company found not unreasonable.

73 I. C. C. 19, *Cleveland, South Western & Columbus Railway,* an interurban electric line which owns no locomotives or cars suitable for interchange, which maintains no regular local freight service, which is primarily a passenger carrier whose freight revenues constitute but 12 per cent of its total operating revenues, treated as subject to the act.

73 I. C. C. 54, *Monongahela Power & Railway,* originally built for electric passenger service, with its lines wholly within West Virginia, but which now transports passengers, freight in carload and less-than-carload quantities, newspapers, and mails, held subject to the act and directed to publish and file schedules of its rates and charges, regulations, and practices applicable to the transportation of coal in interstate commerce.

74 I. C. C. 496, *Michigan Railroad Company,* which operates electric interurban lines wholly within the State of Michigan, treated as subject to the act, and trunk lines directed to establish through routes and joint rates therewith.

74 I. C. C. 593, *Fox & Illinois Union Railway,* an electric line 20 miles in length, operating wholly within the State of Illinois, not required to establish through routes and joint rates with connecting trunk lines.

77 I. C. C. 173, *Chicago, Lake Shore & South Bend Railway* found to discriminate against interstate passenger fares by maintaining lower intrastate fares between points wholly within the State.

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SUBJECT INDEX.

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STATEMENT 1–36

ARGUMENT:

I. THE COMMISSION HAS JURISDICTION OVER THE APPELLANTS, PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND OVER THE SUBJECT-MATTERS COVERED BY THE ORDERS OF NOVEMBER 7, 1921 36–50

II. THE LOWER COURT ERRED IN ENJOINING ENFORCEMENT OF THE COMMISSION'S ORDERS OF NOVEMBER 7, 1921 51–55

TABLE OF CASES CITED.

City of East Liverpool, Ohio, v. *S., E. L. & B. V. T. Co.*, 51 I. C. C. 563 ..... 22, 45

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Willson v. *Rock Creek Ry. Co.*, 7 I. C. C. 83 41

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, Interstate Commerce Commission, and Pennsylvania-Ohio Power & Light Company, Appellants, *v.* THE VILLAGE OF HUBBARD, OHIO, Appellee.	No. 228.

THE UNITED STATES OF AMERICA, The Steubenville, East Liverpool and Beaver Valley Traction Company, and Interstate Commerce Commission, Appellants, *v.* THE CITY OF WELLSVILLE, OHIO, Appellee.	No. 229.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

No. 228 is an appeal from a final decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, enjoining enforce-

ment of an order of the appellant, Interstate Commerce Commission, hereinafter called the Commission, dated November 7, 1921, the body of which reads:

> This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> It is ordered, that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased.
>
> It is further ordered, that this order shall take effect on or before January 4, 1922, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6

of the interstate commerce act, and remain in force until the further order of the Commission. (Rec. 20.)

The order was made and entered in a proceeding before the Commission which was instituted under circumstances and conditions described by the Commission in its aforesaid report, as follows:

> This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, hereinafter referred to as the petitioner, which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The petition alleges that by reason of a franchise contract with the village of Hubbard, made in 1901 by its predecessor, the petitioner is unable to increase its passenger fares between Hubbard and Youngstown to the basis of its fares between Hubbard and Sharon, resulting in undue and unreasonable preference and advantage to persons traveling between Youngstown and Hubbard, and in undue prejudice and disadvantage to other persons traveling interstate between Sharon and Hubbard and to the city of Sharon, and also in unjust and unreasonable discrimination against interstate commerce. It is further alleged that petitioner's inability to increase its intrastate fares to a reasonable basis deprives it of sufficient revenue to pay

its operating expenses and the cost of maintaining its property devoted to said service. (Rec. 14.)

In setting forth facts pertaining to the subject-matter of complaint, the Commission further said:

> In 1917 the Youngstown-Sharon Street Railway Company, the original corporation owning the Youngstown-Sharon line, was merged with four other Ohio corporations and one Pennsylvania corporation under the name of the Mahoning & Shenango Railway & Light Company. This name was subsequently, in 1920, changed to the Pennsylvania-Ohio Electric Company. Later it became necessary to eliminate smaller portions of the railway operations, and on November 1, 1920, a new corporation, the Pennsylvania-Ohio Power & Light Company, the petitioner herein, was formed to take over the Youngstown-Sharon line. The entire common stock of the petitioner is owned by the Pennsylvania-Ohio Electric Company, but its bonds and notes are held by the public, as is also its preferred stock. The line acquired by the petitioner extends only to the Ohio-Pennsylvania State line, and the company operates into Sharon over the tracks of the Shenango Valley Traction Company. The petitioner acquired no power plant, but purchases power from the Ohio-Pennsylvania Electric Company on the basis of actual cost to generate.
>
> Petitioner maintains a regular interurban passenger service every half hour between

Youngstown and Sharon. It also maintains additional separate services between Hubbard and Youngstown and Hubbard and Sharon. Petitioner is also engaged in the transportation of freight, as will be later explained. Passenger fares only are involved.

A franchise ordinance passed by the village of Hubbard in 1901, and accepted by the Youngstown & Sharon Railway, one of the predecessors of petitioner, provided for the maintenance between Hubbard and Sharon of a cash fare of 13 cents, and between Hubbard and Youngstown of a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown, and yield, in the order named, 1.37, 1.14, 1.04, and 0.81 cents per mile. Effective February 15, 1920, the Mahoning & Shenango Railway & Light Company, then operating the petitioner's line, by its tariff duly filed with this Commission, increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with this Commission its tariff I. C. C. No. 4, in which it proposed to establish the same fares between Hubbard

and Youngstown as those in effect between Hubbard and Sharon, above enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It was also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, yielding 2.41 cents per mile, and the 54-trip commutation ticket between those points from $9 to $10, or to a basis of 1.27 cents per mile. This tariff became effective on interstate travel October 1, 1920, and was adopted by the petitioner, the successor to Pennsylvania-Ohio Electric Company, on November 25, 1920. A tariff carrying the same fares was rejected by the Public Utilities Commission of Ohio in so far as it attempted an increase in the fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the franchise contract. Refusals of the Public Utilities Commission of Ohio to allow increases in fares in similar cases have been sustained by the Supreme Court of Ohio. The petitioner shows that prior to filing this petition it and its predecessors exhausted all means through negotiation with the village of Hubbard and otherwise to obtain relief from the franchise fares between Hubbard and Youngstown, but without avail.

The fare applicable to local traffic within the corporate limits of the village of Hubbard is 5 cents and within the corporate limits of Youngstown 9 cents. Petitioner does not seek an increase in these fares. However, under

the Hubbard franchise petitioner is also required to maintain the 5-cent fare between any point within the village and any point not exceeding 1.5 miles beyond the limits of the village in either direction. It developed at the hearing that petitioner seeks to limit the 5-cent fare to points within the village of Hubbard. It was also developed at the hearing that under an ordinance of the county commissioners of Mahoning County, Ohio, petitioner is also required to maintain a 5-cent fare between Youngstown and the Mahoning-Trumbull County line, which is 5.40 miles from petitioner's terminal in Youngstown. It desires to increase this fare to 10 cents. The petition on which the order of investigation herein is based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with the interstate fares between Hubbard and Sharon. As the petition disclosed no complaint against the fare between Youngstown and the county line referred to the authorities of Mahoning County were not served with a copy of our order of investigation herein.

The fares proposed by petitioner between Hubbard and Youngstown—20 cents one way, 8 tickets for $1, and 54-trip commutation ticket for $5—yield revenue, per passenger-mile in the order named, of 2.29 cents, 1.43 cents, and 1.06 cents.

Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with

those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown which is good in either direction, the through fare is defeated by either 5 or 6 cents according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between Hubbard and Youngstown. While the petitioner's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted.

The following table taken from exhibits of record gives a summary of passenger revenue and operating expenses for the year 1920, and, based on the traffic during January, 1921, estimates of what the result of operation will be for the entire year 1921, under the present fares, and what it would be under the pro-

posed fares. The figures submitted do not include any reserve for depreciation, renewals, or for interest on funded and unfunded debt. With the exception of a few items directly related to freight traffic, which were omitted, all of the operating expenses were charged to passenger traffic.

	Actual for 1920.	Estimate for 1921 (present fares).	Estimate for 1921 (proposed fares).
Revenue	$332,173.43	$367,529.22	$417,127.00
Operating expenses:			
Way and structures	48,164.07	65,500.00	65,500.00
Equipment	67,544.52	63,600.00	63,600.00
Power	46,327.22	37,600.00	37,600.00
Transportation	107,005.25	129,400.00	129,400.00
Traffic	595.55	1,200.00	1,200.00
General and miscellaneous	52,129.58	54,000.00	54,000.00
Taxes	23,309.36	23,779.07	24,491.94
Total expenses and taxes	345,075.55	375,079.07	375,791.94
Balance	[1] 12,902.12	[1] 7,549.85	41,335.06

[1] Deficit.

It will be noted that the estimated cost of power in 1921 is substantially lower than the 1920 cost. This is due to the fact that the power is purchased at the switchboard cost and a reduction in the cost of coal is estimated. Power cost in 1920 was 1.42 cents per kilowatt hour and the 1921 estimate is 1 cent.

It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner esti-

mates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85, as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25.

The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919, the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the

> carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year.
>
> The petitioner submitted a valuation of its physical properties, but for the purposes of this investigation it is unnecessary to discuss it. Without consideration of returns on any value whatever, deficits are encountered. (Rec. 14–18.)

In summarizing contentions made by the village of Hubbard, the appellee herein, in the proceeding before the Commission, and in stating its conclusions in the premises, language used by the Commission was as follows:

> The position of the village of Hubbard is summed up in a statement contained in its brief as follows:
>
> "To the claim made by the petitioner that the rates of fare fixed and prescribed by the terms of said franchise ordinance do not provide sufficient compensation or income to maintain proper service and afford a sufficient return on the capital invested, our answer is that this is not the concern of the village of Hubbard, for a bargain is a bargain, and a contract duly entered into by persons competent to enter into it is binding upon all parties and can not be modified or changed without the consent of

all parties. The street railway company had an equal opportunity with the village of Hubbard of looking into the future and foreseeing conditions that might arise, and accepted the contract with its burdens as well as its privileges. The evidence shows that ever since the acceptance of the ordinance in 1901 this company has collected these rates of fare provided by the ordinance, while other companies in other localities were carrying passengers for a less rate of fare over a similar distance, and in justice to all they must consider the fat years with the lean ones, and in so considering a much greater period of time elapsed between 1901 and 1917, when expenses increased and earnings fell off more than from the latter date to the present time, of which the petitioner complains."

The answer to this is that if the maintenance of fares fixed by a franchise contract results in unjust discrimination against interstate commerce, it is within our power to remove it by prescribing other and different intrastate fares.

It is not shown that the present interstate fares between Hubbard and Sharon or between Sharon and Youngstown are unreasonable. On the other hand they appear to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory. For illustration, the fares of the Youngstown & Suburban Railway, extending from Youngstown to Leetonia, 19 miles, and of the Northern Ohio Traction &

Light Company, extending from Cleveland to Urichsville, 103 miles, are on a basis of approximately 3 cents per mile.

We are of opinion and find that the interstate passenger cash and 54-ride commutation fares of the Pennsylvania-Ohio Power & Light Company between Sharon and Hubbard, also the interstate passenger fares between Sharon and Youngstown, are just and reasonable fares for interstate transportation between those points; and that the maintenance of corresponding intrastate fares between Hubbard and Youngstown lower than the just and reasonable interstate fares between Sharon and Hubbard has resulted and will result in undue prejudice to persons traveling in interstate commerce over the petitioner's line in the state of Ohio and between points in the state of Ohio and Sharon, Pa.; in undue preference and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the petitioner under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares herein found reasonable between Hubbard and Sharon. (Rec. 18–19.)

The first hearing in the lower court was upon a motion for a preliminary injunction, which was granted for reasons set forth in an opinion of the court to which we will later refer. The views expressed and the conclusions stated in said opinion were adhered to by the court on final hearing and made the basis of its final decree.

In accordance with a stipulation of counsel for the parties, the record on final hearing was made up as follows:

1. Bill in equity and exhibits.
2. Report, findings, and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission and exhibits.
5. Answer of the Pennsylvania-Ohio Power & Light Company.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity. (Rec. 43–44.)

In its opinion the lower court referred to jurisdictional provisions contained in the interstate commerce act and in section 209 and Title III of the Transportation Act. Also, it reviewed certain decisions of this court, including the decision in *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission,* 230 U. S. 324. In summarizing the jurisdictional provisions the lower court said:

Summarizing and bringing together the references to carriers above quoted otherwise than by railroad, we find street electric railways referred to in these several words: In section 1, paragraph 22, it is "street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." In section 15, as amended June 18, 1910, and reenacted February 28, 1920, the reference is to "street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business." In new section 15a the reference is to "street or suburban electric railways unless operated as a part of a general steam railroad system of transportation." Also to "interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." In new section 20a the reference is to "street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." In section 209, Title II, transportation act of 1920, the reference is to "a street or interurban electric railway * * * which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." In section 300, Title III, the reference is "a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

> Despite these differences in phraseology there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdiction of the Commission. These characteristics are (*a*) being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both. In the varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics are excluded from the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission unless it possesses one or more of these distinguishing characteristics? * * *. (Rec. 38.)

In stating its conclusions the lower court further said:

> From the foregoing considerations we deduce these conclusions: Electric street, suburban, or interurban railways are included within "common carriers by railroad," as that expression is used in section 1 of the interstate commerce act, only when they are

of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the interstate commerce act and the transportation act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transportation; they must be engaged in the general business of transporting freight in addition to their passenger and express business; or they must be operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. If they are not thus engaged or being thus operated, they are not within the act nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business. * * *. (Rec. 41.)

The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation or was engaged in the general transportation of freight in addition to its passenger and express business. Plainly and admittedly, the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads, but it was independently operated, and not as a part of that system. Its traffic relations with the New York Central were limited to receiving

over these switches a few carloads of inbound freight; and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as those cars were received by the defendant railway. Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the Commission's report refers thereto as less-than-carload freight, but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

Our conclusion is that the order of the Interstate Commerce Commission is in excess of any power and jurisdiction conferred upon it by the interstate commerce act, and is void and without effect. The motion to dismiss will be denied, and a preliminary injunction will be granted as prayed. (Rec. 42.)

No. 229 is also an appeal from a final decree of the lower court, enjoining enforcement of an order of the Commission, dated November 7, 1921, which is in substance as follows:

This case being a proceeding instituted by the Commission upon petition filed, and hav-

ing been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the Steubenville, East Liverpool & Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future.

It is further ordered, That this order shall take effect on or before January 6, 1922, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the Commission. (Rec. 15.)

The order was made and entered in a proceeding before the Commission, which was instituted under circumstances and conditions described by the Commission in its report, as follows:

This proceeding was instituted by us upon petition filed on behalf of the Steubenville,

East Liverpool & Beaver Valley Traction Company, hereinafter called the traction company, operating an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, and also a local service between certain points within Ohio, and a branch line to Chester, W. Va. In substance the petition alleges that by reason of various franchises, ordinances, and regulations imposed under authority of certain municipalities of the States of Ohio and Pennsylvania, the petitioner is unable to increase its fares for the transportation of passengers intrastate to the basis maintained on interstate traffic, resulting in undue and unreasonable advantage and preference to persons and localities in intrastate commerce on the one hand and in undue prejudice and disadvantage to other persons and localities in interstate commerce on the other hand, and also in unjust and unreasonable discrimination against interstate commerce; and, further, is deprived of sufficient revenue to pay its operating expenses, including taxes and the cost of maintaining its property devoted to the service. Passenger fares only are involved. (Rec. 7.)

In setting forth facts pertaining to the subject-matter of complaint, the Commission further said:

The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a

total distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio.

* * * * *

Besides a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. * * *. The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction company handles only freight local to its line. No freight is handled oven [over] the branch lines. The traction company files its tariffs with this Commission, and publishes interstate passenger fares between points on its lines. It is subject to our

jurisdiction. *City of East Liverpool, Ohio,* v. *S., E. L. & B. V. T. Co., supra.*

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport.

The interstate fares of the traction company now in effect are published in its tariff(s) I. C. C. No. 8. This tariff publishes, among others, fares for through service between Vanport and Steubenville and between all points on its main line both in Pennsylvania and Ohio. It contains no provision for free transfers.

A tariff naming the same scale of fares as carried in I. C. C. No. 8 was permitted to become effective September 20, 1920, by the Public Service Commission of Pennsylvania, but a similar tariff was rejected by the Public Utilities Commission of Ohio on the ground that the fares charged by the traction company in that State were regulated by municipal ordinances and franchises granted to its prede-

cessors and therefore beyond the power of the State authorities to change. Under the terms of franchise ordinances of Wellsville and East Liverpool the traction company is prohibited from charging more than 5 cents for the transportation of passengers between the eastern limit of East Liverpool, which is State Line, and the boundary line between Columbiana and Jefferson Counties, which is approximately the western limit of Wellsville, a distance of 10.7 miles. In addition it is required to furnish free transfers to branch-line points in East Liverpool, except to Chester. The interstate fare from State Line to Woosters, which is also approximately at the western limit of Wellsville, a distance of 10.4 miles, is 20 cents.

By franchise ordinances of the village of Toronto the traction company is required to charge a fare not in excess of 5 cents between Fosterville and Costonia, 4.2 miles, with 13 tickets for 50 cents. These two points are between Country Club and Minors, south of the county line, and the interstate fare between these latter points is 20 cents for 7.2 miles. By franchise ordinances of Steubenville, the traction company may not charge more than 5 cents within that city, or six tickets for 25 cents, with free transfers. This was modified on April 8, 1919, so as to allow a fare of not more than 6 cents, or nine tickets of [for] 50 cents, with free transfers. The increase was limited to expire April 8, 1921. The interstate fare over the interurban line from the city limits of Steubenville to the end

of the line at Sixth Street, 1.7 miles, is 10 cents. The interstate fare over the branch lines in Steubenville is 8 cents, except that between Crawford Avenue and Wellesley Avenue, 4.32 miles, it is 16 cents.

The interstate fare between Smiths Ferry, Pa., and Woosters, Ohio, 11.7 miles, is 25 cents, while the intrastate fare between State Line and Woosters, 10.4 miles, is 5 cents. The fare from Smiths Ferry to State Line is 10 cents and from State Line to Woosters, intrastate, 5 cents. Through passengers may therefore defeat the interstate fare to the extent of 10 cents a trip by buying tickets or tendering cash fares to and from State Line. The interstate fare from East Midland, Pa., to Country Club, Ohio, 29.7 miles, is 65 cents, while the intrastate fare from State Line to Country Club, 24.5 miles, is 40 cents. Here, also, by the use of the intrastate fare from State Line to Country Club, the interstate fare may be defeated to the extent of 10 cents. In the interurban service interstate passengers and intrastate passengers ride in the same cars and over the same rails.

In the following table interstate interurban fares between representative Ohio points on the traction company's line, provided in tariff I. C. C. No. 8, are stated with earnings per mile thereunder. These are compared with the fares and earnings under the intrastate scale between the same points.

From—	To—	Distance.	Interstate.		Intrastate.	
			Fare.	Earnings per passenger-mile.	Fare.	Earnings per passenger-mile.
		Miles.	*Cents.*	*Cents.*	*Cents.*	*Cents.*
State Line	East Liverpool (terminal)	3.8	10	2.63	5	1.31
Do	East Liverpool (diamond)	4.1	15	3.66	5	1.22
Do	Woosters (western limit of Wellsville)	10.4	20	1.92	5	.48
Woosters	Kountz	3.9	10	2.56	5	1.28
Steubenville (city limits)	Country Club	2.6	10	3.84	5	1.92
Country Club	Jeddo	3	10	3.33	10	3.33
Jeddo	Myers Lane	2	10	5	5	2.5
Myers Lane	Minors	2.2	10	4.54	10	4.54
State Line	Steubenville (city limits)	27.1	60	2.21	45	1.66
Do	Steubenville (Sixth Street)	28.8	65	2.26	51	1.77
Country Club	East Liverpool (diamond)	20.4	50	2.45	40	1.96
Myers Lane	State Line	19.5	45	2.3	35	1.79

The lower intrastate fares have had the effect of practically denying to the traction company the use of its interstate fares. For example, the through interstate fare from Vanport to the terminus of the line at Sixth Street, Steubenville, 40.2 miles, is 90 cents. A passenger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from

Steubenville, and examples could be multiplied.

It is to be noted that between points in Ohio on the traction company's line where fares are not held down by municipal franchises and ordinances the intrastate and interstate fares are more nearly on a parity. For example, between Country Club and Jeddo, 3 miles, and between Myers' Lane and Minors 2.2 miles, the intrastate fares are the same as the interstate, 10 cents; also between the city limits of Steubenville and Jeddo, 5.6 miles, the intrastate fare is 15 cents, the same as the interstate fare.

In the interurban service between Vanport and Steubenville and intermediate points the fares increase 5 cents for each zone. The minimum fare provided in the interstate schedule is 10 cents. This is not, strictly speaking, a minimum fare, although usually so designated in the record, but is in fact an initial fare, and by the manner in which it operates results in the collection of an additional amount of 5 cents. For illustration, three 5-cent zones are included from State Line to Woosters, but by reason of this initial fare a passenger boarding an interurban car at State Line for Woosters pays a fare of 20 cents. If this were a minimum charge the fare would be 15 cents. A minimum fare of 10 cents in interurban service appears to be reasonable and has been approved in numerous instances by the Public Service Commission of Pennsylvania and the Public Utilities Commission of Ohio, but no sufficient justification

has been shown on this record for the collection of this amount as an initial fare; provided, however, that this is not to be construed as requiring the maintenance of any interstate fare between points on the traction company's line lower than the intrastate fare contemporaneously maintained between the same points.

The traction company also maintains a local interurban service between State Line and Woosters, the western limits of Wellsville, 10.4 miles, operating through the city of East Liverpool, East Liverpool Township, and Wellsville. The present intrastate fare for this service, as hereinbefore stated, is 5 cents, with free transfers to branch-line points in East Liverpool. This fare yields less than 5 mills per mile. Under its tariff I. C. C. No. 8, the traction company divides this local service into three zones: (1) State Line to diamond in East Liverpool, 4.1 miles; (2) diamond to Kountz, 2.4 miles; (3) Kountz to Woosters, 3.9 miles. An interstate fare of 5 cents is provided for each zone with no transfers. For these respective distances this 5-cent fare yields per passenger-mile revenues of 1.22, 2.08, and 1.28 cents. A 5-cent fare, therefore, for each of these zones would appear amply justified. The evidence shows that because of the lower intrastate fare the interstate local fares are defeated and the traction company has seldom been able to derive any benefit from them. For example, the interstate fare from Vanport to Woosters is 45 cents. A passenger boarding a car at Vanport with

Woosters as his intended destination, by paying the fare of 30 cents to the State Line and then the local intrastate fare of 5 cents to Woosters, effectually evades the payment of the interstate fare from Vanport to Woosters as well as the interstate fare from State Line to Woosters. There is considerable traffic on this local division, the number of revenue passengers for the year ended December 31, 1920, being shown as 3,227,652.

The intrastate fare in effect over the city or branch lines above referred to is 5 cents, except when transfers are used. The interstate fare is 8 cents, except that between Crawford Avenue and Wellesley Avenue, in Steubenville, as above shown, it is 16 cents.

The traction company asserts that because of the low intrastate fares it is unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon; that its bond interest is in default of payment for more than a year; and that the costs of the railway are continually increasing. It is shown that the line in many respects is in a run-down condition. Many bridges and trestles should be immediately repaired or renewed, but the company is unable to remedy this condition because of lack of funds. It has sought relief from the several Ohio municipalities which control the intrastate fares, also from the Ohio Legislature, but without avail. It is averred that unless relief is granted by this Commission by removing the unjust discrimination complained of by raising the intrastate fares to the level of

the interstate fares it will be compelled in the near future to discontinue its functions as an interstate carrier.

The following table summarizes the results of operation for the years 1918, 1919, and 1920:

	1918	1919	1920
Income	$770,167.50	$840,600.62	$949,171.49
Operating costs	601,980.59	725,893.91	865,997.12
Net income	168,186.91	114,706.71	83,174.37
Taxes	53,932.99	58,841.96	66,441.94
Net income less taxes	114,253.92	55,864.75	16,732.43
Interest on bonds	74,150.00	74,150.00	74,150.00
Interest on unfunded debt		4,650.00	
Interest on deposits	3,705.10	6,173.93	4,799.24
Surplus	43,809.02	[1] 16,761.32	[1] 52,618.33

[1] Deficit.

Interest on bonds has not been paid since November, 1919. Wages of conductors, motormen, and trainmen increased from $148,841.25 in 1918 to $162,057.99 in 1920 and $197,522.49 in 1921, and during those years the cost of power purchased more than doubled, increasing from $60,606.01 in 1918 to $114,196.20 in 1919, and again to $134,613.14 in 1920.

The freight earnings reported in the traction company's annual reports under express were in 1919, $14,864.79 and in 1920, $23,018.09. The evidence indicates that these freight revenues exceed the freight operating expenses.

The traction company also submitted statements of passenger earnings on various portions of its system, but in preparing these figures it charged to passenger traffic the

entire operating expenses of the line. In the city of Steubenville, during the year 1920, the passenger earnings, less operating expenses, were $20,821.65 on the interurban line, $3,759.57 on the Fourth Street line, and $4,216.18 on the La Belle View line; a total of $28,797.40. Between Fosterville and Costonia there was a deficit of $5,725.20, and south of the county line the interurban line earned an excess of $17,491.36 over operating costs. Between the State and county lines there was a deficit of $53,862.89, of which $38,757.42 was on the main line. The only branch line in the city of East Liverpool showing a profit was the Chester line. It earned a profit in Ohio of $5,107.75, and in West Virginia of $18,882. The total number of passengers handled on the entire line during the year 1920 was 10,720,707.

Evidence offered by the Ohio municipalities shows that certain relief has been offered to the traction company, but that the company has refused to accept it. The traction company shows that whatever relief has been offered has always been accompanied with such further restrictions as to make its acceptance of doubtful value; and that, as a result of the interlocking nature of the franchises and ordinances of the different municipalities, it is practically impossible to get them in agreement on any measure of relief. (Rec. 7–13.)

In summarizing contentions made by the city of Wellsville, appellee herein, in the proceeding before

the Commission, and in stating its conclusions in the premises, the language of the Commission was as follows:

> It is contended by the municipalities (*a*) that jurisdiction does not lie in this Commission to alter the fares fixed by ordinance or franchise; and (*b*) that the merger of electric railways originally performing purely intrastate and principally city street-car service into the present operating company does not change their original status. As to the latter contention, it is sufficient to say that whatever may have been the original service afforded by the respective railways at the time of the merger, the traction company now is carrying on much more than a street-railway business. In its interurban operations it now assumes the status of an electric railway, and as such it is engaged in interstate transportation.
>
> As to the first contention: There is not encountered here the usual assumption on the part of the State of jurisdiction over such service, the State of Ohio not having withdrawn from municipalities the franchise privilege and power over highways. There is encountered, however, an exceptional assumption of extraterritorial jurisdiction by municipalities. While under the Omaha street-railway decision, *Omaha & C. B. St. Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it may consistently be argued that this Commission has no jurisdiction over a city street-car line and may not impose

rates and conditions for local service other than those stipulated in a franchise, it is not seriously to be contended that the Federal Government in its efforts to maintain facilities of interstate communication and to prevent discrimination is to be prevented by municipalities which, in franchises involving the use of their local streets, assume to regulate the rates to be charged to and between other cities; and particularly when such franchises impose rates which, under present conditions, obviously are unjust and which menace maintenance of interstate transportation facilities and service.

We are not satisfied on this record that we are warranted in disturbing the intrastate basis of fares now in effect on petitioner's branch or city lines, nor are we convinced that the issuance of transfers as now in effect intrastate is unreasonable in connection with fares for interstate travel, provided, however, that such transfers to the interurban line between Vanport and Steubenville, or to local cars operating between State Line and Woosters, should be valid for transportation over one zone only.

We are of opinion and find, subject to the reservations above noted with respect to the initial fares, fares on branch or city lines, and the issuance of transfers, that the interstate passenger fares of the traction company between Vanport and Sixth Street, Steubenville, and intermediate points, and designated as "through service rates" in its tariff I. C. C. No. 8, and the interstate passenger fares

between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, as published in the traction company's tariff I. C. C. No. 8 among its list of rates designated "local service rates," are just and reasonable interstate fares for the respective services between those points; and that the maintenance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce over the traction company's lines in the State of Ohio and between points in the State of Ohio and points in the State of Pennsylvania; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce.

We further find that, whether the aforesaid passenger fares pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services are performed by the traction company under substantially similar circumstances and conditions; and that said undue prejudice and preference and unjust discrimination can and should be removed by establishing intrastate passenger fares not less than the interstate passenger fares herein found reasonable; provided, however, that the fares herein authorized are for application in connection with through travel, irrespective of municipal limits, or the interurban operations of petitioner, and

> nothing herein is to be construed as authorizing any change in the fares as now in effect on the traction company's line for transportation of passengers who begin and end their journey within the limits of any municipality. (Rec. 13–15.)

In this case, also, the first hearing in the lower court was upon a motion for a preliminary injunction, which was granted for reasons set forth in the opinion of the court hereinbefore mentioned, and applied by the court to this case in the language following:

> This suit is the counterpart of the *Village of Hubbard* vs. *The United States et al.*, this day decided. It was heard, argued, and submitted at the same time, and involves substantially similar facts and precisely the same questions of law. These questions likewise arise upon plaintiff's application for a preliminary injunction and upon motion of defendants, the United States and the Steubenville, East Liverpool & Beaver Valley Traction Company, to dismiss, and upon answer to the merits filed by the Interstate Commerce Commission setting up its order and its findings of fact. The same conclusion and judgment is required.
>
> The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found, is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated

as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant, than in the Village of Hubbard case. In the company's annual reports its gross receipts from these freight earnings are reported under express earnings. The company is not, in our opinion, subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in our opinion in the Village of Hubbard case.

The motion to dismiss will be denied. A preliminary injunction will be granted as prayed. (Rec. 33-34.)

In accordance with a stipulation of counsel for the parties, the record on final hearing was made up as follows:

1. Bill in equity and exhibits.
2. Report, findings and order of the Interstate Commerce Commission.
3. Motions of the United States and the other defendants to dismiss the bill in equity.
4. Intervention and answer of the Interstate Commerce Commission, and exhibits.
5. Answer of the Steubenville, East Liverpool & Beaver Valley Traction Company and exhibits.
6. Motion of plaintiff for preliminary injunction.
7. Order granting preliminary injunction and overruling motions to dismiss the bill in equity,

8. As between the plaintiff and the Steubenville, East Liverpool & Beaver Valley Traction Company only, copies of the ordinances numbered 181, 408, 594, and 610 and 649 admitted in evidence by order of court over the objections and exceptions of the counsel for the United States and the counsel for the Interstate Commerce Commission who protest that the same are not properly a part of the record on any issue in the case. (Rec. 67.)

In discussing in these cases points covered by the assignments of error, we will endeavor to show that the court erred in holding that the Commission is without jurisdiction over either the appellants, Pennsylvania-Ohio Power & Light Company and The Steubenville, East Liverpool & Beaver Valley Traction Company, to whom the orders of November 7, 1921, were directed, or over the subject-matters covered by the orders, and erred also in enjoining enforcement of the orders.

ARGUMENT.

I.

THE COMMISSION HAS JURISDICTION OVER THE APPELLANTS, PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND OVER THE SUBJECT-MATTERS COVERED BY THE ORDERS OF NOVEMBER 7, 1921.

We think the jurisdictional provisions referred to by the lower court in support of its conclusion that the Commission is without jurisdiction over either

the carriers or the subject-matters, covered by the orders of November 7, are inapposite, for the reason that they pertain to matters other than those to which the orders apply. In this connection we will comment first upon the provisions referred to by the lower court which are included in certain sections of the interstate commerce act.

The restrictions contained in paragraph (22) of section 1 relate to authority conferred upon the Commission by paragraphs (18) to (21), inclusive, of that section, in connection with the extension, construction, acquisition, operation and abandonment by carriers subject to the act of lines of railroad.

The restrictions in paragraph (3) of section 15 relate to authority conferred upon the Commission to establish through routes, and joint rates, fares, charges, classifications and practices applicable to such routes.

The restrictions in paragraph (1) of section 15a relate to what is known as the group theory of establishing rates and the disposition of earnings of individual carriers in excess of 6 per cent of the value of the property used by the carrier in making the earnings, with certain exceptions which are unimportant in connection with the matter under consideration here.

The restrictions in paragraph (1) of section 20a relate to securities to be issued by certain carriers and liabilities in connection therewith to be incurred by the carriers.

It will be observed that none of the jurisdictional provisions mentioned is directly connected with any of the subject-matters covered by the orders of November 7. Instead of tending to show that the Commission has no jurisdiction over the carriers named in and the subject-matters covered by the orders, we think the fact that Congress saw fit to make the exceptions referred to is persuasive to the effect that Congress believed the Commission would otherwise have jurisdiction over the carriers and subject-matters covered by the exceptions; and a like statement may be made in connection with the other jurisdictional provisions to which the lower court referred.

Section 209 of the transportation act is commonly referred to as the guaranty section. This section, generally speaking, guarantees to all carriers entitled to compensation under the Federal control act, for six months beginning March 1, 1920, the same income, proportionately, they would have had if they had been under Federal control during that period, with modifications and upon conditions which are not important in connection with this discussion; and Title III of the transportation act covers jurisdiction to be exercised by the Railroad Labor Board over wages and working conditions of employes of common carriers.

It is admitted that the carriers to whom the orders are directed are engaged in transporting passengers and property by railroad between points in different States of the United States, and this appears to bring

them and the passengers and property so transported within the jurisdiction of the Commission as that jurisdiction is described in paragraph (1) of section 1 of the interstate commerce act, from which we quote as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, * * *.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property * * *, but only in so far as such transportation * * * takes place within the United States, but shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

It is contended, however, that said carriers and the railroads operated by them are the same in character as the carrier and railroad involved in *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission*, 230 U. S. 324, which this court held were not within the Commission's jurisdiction.

In its decision in the *Omaha case*, this court, in describing the carrier and the business done by it,

and in stating its conclusion, among other things, said:

> The Omaha & Council Bluffs Railway & Bridge Company was chartered as a street railroad company under the laws of Iowa. It owned street car lines in Council Bluffs and, in 1887, was authorized by Congress to construct a bridge across the Missouri River and to operate thereon "steam, cable and street cars." (March 3, 1887, 24 Stat. 501, c. 356.) The Omaha & Council Bluffs Railway, chartered as a street railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired the bridge and car lines in Council Bluffs which thereafter it operated as part of its system. * * *. (Id. 332–333.)
>
> The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.
>
> But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the State courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of States. The present record

discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson* v. *Rock Creek Ry. Co.*, 7 I. C. C. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word "Railroad" includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that "Railroad" does not include street railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & Portland R. R. Co.* v. *Louisville City Ry. Co.*, 2 Duvall, 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "Railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word,

> it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by State lines, or under different municipal control. When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. * * *. (Id. 334–336.)

It will be seen that the court was of opinion that the city of Omaha and its suburbs and the city of Council Bluffs constituted in fact only one community, and that the business done by the Omaha & Council Bluffs Street Railway Company in serving that community was simply such as is ordinarily done by a street railroad, properly so-called, which the court distinguished from an interurban railroad in the following language:

> It is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight,

express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. * * * (Id. 337.)

In its report in No. 228, as hereinbefore shown, the Commission, in describing the carrier and the business done by it, among other things, said:

> This proceeding was instituted by us upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company, * * * which operates an electric line approximately 14.5 miles in length between the cities of Youngstown, Ohio, and Sharon, Pa., passing through the village of Hubbard, Ohio. * * * (Rec. 14.)
>
> * * * The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, * * *. (Rec. 17–18.)

In describing the freight business done by the carrier, the Commission further said:

> The petitioner has connections, one direct and the other over a private siding, at Masury and at Stop 41, both east of Hubbard, with the New York Central Railroad, and while petitioner does not originate and deliver freight traffic to this line, it received from it, during the year 1919 and 1920, 922 cars of freight for delivery chiefly at points on the petitioner's line. The New York Central forms a connecting link between petitioner's line and other trunk lines. The petitioner also operates a

> daily less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New Castle Railroad. The petitioner also participates with other electric lines in through freight rates from points on its line to Cleveland and Toledo, Ohio, Detroit, Mich., and other points. In 1919 the less-than-carload freight amounted to 6,240 tons and produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the petitioner for that year. (Rec. 18.)

And in its report in No. 229 the Commission, as we have previously shown, described the lines of railroad operated by The Steubenville, East Liverpool & Beaver Valley Traction Company, and the business done by that carrier, as follows:

> The main line of the traction company, which is double tracked, extends along the Ohio River from Vanport, Pa., west to the Pennsylvania-Ohio State line, hereinafter referred to as State Line, thence in a general southerly direction to Steubenville, Ohio, a total distance of 40.2 miles. Of this trackage 11.4 miles are in Pennsylvania and 28.8 miles in Ohio. The line passes through various cities,

townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio. (Rec. 7-8.)

Besides a coal branch there are six branch lines engaged in transporting passengers, four in East Liverpool and two in Steubenville. * * * The main line and also the branches are, for the greater distances, upon private rights of way, but where they pass through towns and villages they are generally upon streets and highways.

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville. Passengers, however, are required to change cars at the diamond in East Liverpool. The traction company handles no baggage as such. A daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at time of hearing was about once a week. Except for this traffic to Beaver the traction company handles only freight local to its line. No freight is handled oven [over] the branch lines. The traction company files its tariffs with this Commission, and publishes interstate passenger fares between points on its lines. It is subject to our jurisdiction. *City of East Liverpool, Ohio*, v. *S., E. L. & B. V. T. Co., supra.*

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh &

> Lake Erie Railroad at Beaver. It is stated that as a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport. (Rec. 8–9.)

We think the foregoing comparisons show clearly that the decision of this court in the *Omaha case* does not support the conclusion of the lower court that the Commission is without jurisdiction over either the Pennsylvania-Ohio Power & Light Company or The Steubenville, East Liverpool & Beaver Valley Traction Company or the transportation of passengers and property in interstate commerce in which those carriers engage. On the contrary, we feel certain the court will conclude that such jurisdiction is fully established by the language contained in paragraph (1) of section 1, to which we have referred.

If the views expressed by the lower court in this connection are found by this court to be correct, the inevitable result will be to leave without governmental regulation of any kind the rates, fares, and charges of interurban common carriers engaged in the transportation of passengers and property between points in different States and Territories of the United States. The court will take judicial

notice of the fact that the interstate business of such carriers is now comparatively large and is increasing in volume rapidly, and under these circumstances we are convinced that the court will not construe the interstate commerce act as including a limitation upon the jurisdiction of the Commission which Congress has not seen fit to put there in plain and unmistakable language.

However, the passenger fares covered by the Commission's order of November 7 are not interstate; they are instead intrastate; and over such fares the Commission does not have general jurisdiction, as is shown by subdivision (a) of paragraph (1) of section 1, hereinbefore set forth. It has jurisdiction over such fares, though, for the purposes and under the conditions described in paragraphs (3) and (4) of section 13 of the interstate commerce act, which read:

> (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to

this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and

> practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision of any State authority to the contrary notwithstanding.

These paragraphs are an amendment to section 13 which was brought about by the passage of the transportation act, and the language contained in the paragraphs does not indicate an intention on the part of Congress to limit the jurisdiction of the Commission as it is limited, in connection with matters other than those covered by said paragraphs, by the jurisdictional provisions to which the lower court referred.

The jurisdiction exercised by the Commission in making the orders of November 7 appears to us to be practically the same as the jurisdiction exercised by the Commission in making the order involved in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, commonly called the *Shreveport case*, which was held by this court to be valid, in a decision rendered on June 8, 1914, a date several years prior to the date of passage of the transportation act.

We have shown that, in the cases under consideration here, the Commission found that unjust discrimination against interstate commerce existed under substantially similar conditions and was caused by the intrastate passenger fares covered by the orders of November 7. Concerning such a case, this court, in its decision in the *Shreveport case*, said:

> Here the Commission expressly found that unjust discrimination existed under substan-

tially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. * * *. (Id. 358.)

* * * We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and where the interests of the freedom of interstate commerce are involved the judgment of Congress and of the agencies it lawfully establishes must control. (Id. 359–360.)

THE LOWER COURT ERRED IN ENJOINING ENFORCEMENT OF THE COMMISSION'S ORDERS OF NOVEMBER 7, 1921.

Views expressed by the lower court in the opinions upon which it based its conclusions that the Commission was without jurisdiction over the subject matters covered by the orders of November 7, and over the carriers to whom the orders were directed indicate, we submit, that the court would not have enjoined enforcement of the orders if it had reached a contrary conclusion concerning the question of jurisdiction. Pertinent statements contained in the opinions mentioned are, respectively, as follows:

> The situation is fully and correctly set forth in the Interstate Commerce Commission's report, and, inasmuch as this has been published, 64 I. C. C. 498, it will not be repeated here except so far as is necessary to show clearly the questions to be decided and the basis of our decision. * * *. (Rec. 30.)
>
> The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. * * *. (Rec. 33.)

In view of these statements and for the reason that the Commission's findings of fact have been fully set forth in this brief under the heading of "Statement," we do not deem it necessary to do more at this point than to call attention to some of the important findings upon which the Commission's conclusions of undue prejudice and preference and unjust discrimination are based.

In No. 228, after finding that the interstate fares of the carrier are reasonable, the Commission found:

That the intrastate fares involved are much lower than said interstate fares. (Rec. 15–16.)

That industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place and travel daily back and forth over the carrier's line; that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown, and that workmen living in Hubbard are employed in Sharon. (Rec. 16.)

That because of the existence of the lower intrastate fares the higher interstate fares can not be fully maintained. (Rec. 17.)

That the result of the operations of the carrier for the year 1920 was a deficit of $12,902.12; that the deficit estimated under present fares for the year 1921 was $7,549.85, and that the revenue and surplus estimated under proposed fares for the year 1921 were, respectively, $417,127 and $41,335.06. (Rec. 17.)

That the deficits and surplus above mentioned are the results of computations which do not include allowances to the carrier for returns upon the value of its property. (Rec. 18.)

Other comparisons made by the Commission were as follows:

> It is shown that in 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06, as compared with a profit of $18,361.94 between Hubbard and Sharon. The petitioner estimates that in 1921 it will transport 1,897,890 intrastate and 1,180,607 interstate passengers, and that at the present fares the intrastate passenger traffic will yield $162,721 as against $204,808 from the interstate passenger traffic. In other words, intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85 as shown above. It estimates that under the proposed fares the Youngstown-Hubbard deficit would be turned into a profit of $16,399.25. (Rec. 17–18.)

In No. 229 the Commission made similar findings concerning the reasonableness of the interstate fares, the disparities between the intrastate and interstate fares, the discriminations which result from such disparities, the impossibility of maintaining the reasonable interstate fares, caused by the existence of the lower intrastate fares, and the results of operations of the carrier, for the years 1918, 1919 and 1920. In illustrating the disparities in cents per passenger mile between the interstate fares on the one hand and the intrastate fares on the other, the Commission

set forth in tabular form comparisons which are as follows:

Interstate (cents).	Intrastate (cents).
2.63	1.31
3.66	1.22
1.92	.48
2.56	1.28
3.84	1.92
3.33	3.33
5	2.5
4.54	4.54
2.21	1.66
2.26	1.77
2.45	1.96
2.3	1.79

(Rec. 10.)

The Commission found that operating results were: For the year 1918 $43,809.02 surplus; for the year 1919 a deficit of $16,761.32, and for the year 1920 a deficit of $52,618.33, while operating incomes for the three years mentioned were, respectively, $770,167.50, $840,600.62 and $949,171.49. (Rec. 12.)

In each case, as hereinbefore shown, the Commission found that, regardless of whether they pertained to passengers traveling in intrastate commerce or to passengers traveling in interstate commerce, the transportation services were performed by the carriers under substantially similar circumstances and conditions.

It will be observed that the matters we have discussed in this brief do not present any conflict between authority exercised by State commissions on the one hand and the Interstate Commerce Commission on the other. In No. 228 the village of Hubbard stands upon its ordinance as a contract right, over which the Ohio commission can exercise

no jurisdiction under the law as construed by the Supreme Court of that State, and the city of Wellsville, Ohio, stands upon a like contract right in No. 229. The two cases are alike in principle, but in No. 229 ordinances of several cities are involved. Also, it will be seen that the scope of the ordinance contracts stretches beyond the boundaries of the municipalities, that is to say, extraterritorial jurisdiction is conferred by the State of Ohio upon each of the municipalities.

If, as held by this court in *New York* v. *United States*, 257 U. S. 591, neither the action of a State legislature, in granting a charter to a corporation and clothing it with power to act as a common carrier, nor provisions contained in the constitution of the State, will be permitted to stand in the way of Federal regulation of interstate commerce, it is difficult to understand how it can be successfully contended that a village ordinance or a city ordinance should be construed as having that effect, since the source of the authority exercised in making such an ordinance is the State of which the village or the city is only a political subdivision.

For the reasons above set forth we insist that the decrees of the lower court should be reversed, and that the cases should be remanded to that court with directions to dismiss the bills of the appellees.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

DECEMBER, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923. No. 228.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY.

I. STATEMENT OF THE CASE.

1. Introduction.

This is an appeal from the final decree of the United States District Court (sitting, and hereinafter referred to, as the Statutory Court pursuant to the Act of 22 October, 1913, 38 Stat. L. 219) for the Northern District of Ohio, Eastern Division, suspending, restraining and setting aside, an Order of the Interstate Commerce Commission made and entered on 7 November, 1921, in a proceeding entitled: *In the matter of rates, fares and charges of The Pennsylvania-Ohio Power & Light Company within the States of Ohio and Pennsylvania,* Docket No. 12123, 64 I. C. C. 493.

The case comes directly to this Court upon appeal as required by that Act.

The Record is extremely short, as the case was disposed of on the bill, motions and answers. It contains only the bill with exhibits, the answers and motions, the Report and Order of the Commission, the decree and opinion of the Statutory Court.

2. Description of the Parties.

The plaintiff in the bill is the Village of Hubbard, Ohio, a municipal corporation of that State. It is hereinafter referred to as Hubbard.

The defendants are, the United States of America, the Interstate Commerce Commission, and The Pennsylvania-Ohio Power & Light Company.

The Pennsylvania-Ohio Power & Light Company (hereinafter referred to as Carrier) is a corporation of the State of Ohio, being incorporated under Section 8625 of the General Code of Ohio, having the power of eminent domain (R., 25).*

The Carrier owns and operates a *high speed interurban electric railroad* from Youngstown, Ohio, to Sharon, Pennsylvania, a distance of 14.5 miles. Its road is of standard gauge construction and is for the most part built on private right of way. It transports both passengers and freight in interstate commerce (R., 25). It maintains a regular half-hour interurban passenger service between Youngstown and Sharon, and additional special service between Youngstown and Hubbard, and Sharon and Hubbard. Hubbard is 8.75 miles from Youngstown and 7.18 miles from Sharon (R., 14-15). The Carrier transports annually about 1,897,000 *intrastate* and about 1,180,000 *interstate* passengers.

The Carrier has two freight connections on its line with a steam carrier (the New York

* These citations refer to the pages of the Transcript of Record.

Central); one direct, the other over a private siding at Masury, Ohio. While it does not originate freight shipments, it received from the New York Central in 1919 and 1920, 922 cars of freight for delivery to points along its line. The connection with the New York Central gives Carrier access to other trunk line steam carriers (R., 18).

The Carrier also participates with other interurban electric railroads in through freight rates from points along its line to Cleveland and Toledo, Ohio, and Detroit, Michigan, and other points (R., 18).

The Carrier also operates daily a less-than-carload freight service between its terminals, and operates on three days a week a similar service between Sharon and New Castle, Pennsylvania, *via* Hubbard, Ohio, and the Sharon and New Castle Railroad. In 1919 it transported 6,240 tons of this freight, and in 1920, 5,474 tons (R., 18).

The Carrier's line was built about 1901 by the then Youngstown-Sharon Street Railway Company which was later merged with five other Pennsylvania and Ohio corporations under the name of Mahoning & Shenango Railway & Light

Company which later changed its name to The Pennsylvania-Ohio Electric Company and in 1920 sold this line to Carrier which now operates it (R., 14-15).

3. Description of the Subject Matter.

When Carrier's line was constructed about 1901, Hubbard in granting it a franchise to occupy certain streets, enacted in that franchise ordinance of 12 September, 1901 (R., 7-13), and accepted by Carrier's predecessor, a provision which attempted to regulate the passenger fares of Carrier, both interstate and intrastate. The principal fares thus attempted to be prescribed were (R., 10-12, 15):—

Classification of Fare.	*Between.*	*Rate.*
Cash	Hubbard and Youngstown	$ .12
	Hubbard and Sharon	.13
1 round-trip ticket	Hubbard and Youngstown	.20
	Hubbard and Sharon	.20
11 round-trip tickets (special)	Hubbard and Youngstown	2.00
	Hubbard and Sharon	2.00
54-ride commutation ticket	Hubbard and Youngstown	3.80
	Hubbard and Sharon	3.80

These fares continued until 1920, when Carrier's predecessor by tariff filed with the Interstate Commerce Commisison cancelled the round-trip and special round-trip tickets between *Hubbard and Sharon (interstate);* and increased the cash fare between those points from 12 cents to 20 cents and the 54 commutation ticket from $3.80 to $5.00 (R., 15).

Later in the same year Carrier's predecessor filed a tariff with the Interstate Commerce Commission which increased the *Youngstown-Sharon (interstate)* cash fare from 30 cents to 35 cents and the 54 commutation ticket from $9.00 to $10.00.

In the *same* tariff it also increased the *Hubbard-Youngstown (intrastate)* cash fare from 13 cents to 20 cents, and the 54 commutation ticket from $3.80 to $5.00, making the *intrastate* rates the same as the *interstate* rates. This was done in order to remove the discrimination against interstate commerce.

This tariff became effective on *interstate* traffic on 1 October, 1920. A similar tariff was filed with the Public Utilities Commission of Ohio to govern *intrastate* traffic. That tariff never became effective because the Ohio Commission was without statutory power to allow or establish rates in excess of those prescribed by franchise contracts (R., 16).

Under the franchise rates Carrier in 1920 suffered a *deficit* of $12,902 on its passenger traffic, before any reserve for depreciation and renewals (R., 17).

Prior to instituting these proceedings before the Interstate Commerce Commission, Carrier

endeavored to have the unjust discrimination and undue prejudice against *interstate* traffic and undue preference in favor of *intrastate* traffic removed and relief given it by negotiations with Hubbard, but without avail (R., 16).

Carrier then filed its petition with the Commission alleging these facts and asked the Commission to order the unjust discrimination, undue prejudice, undue preference and burden to be removed (R., 14).

After extensive hearings (in which Hubbard and Youngstown participated) the Commission by Report and Order dated 7 November, 1921, found that there was an undue prejudice resulting to persons travelling in *interstate* commerce, an undue preference and advantage resulting to persons travelling in *intrastate* commerce, and an unjust discrimination against *interstate* commerce (R., 19).

It ordered Carrier to cease and desist from practicing the undue prejudice, undue preference and undue advantage, and unjust discrimination, and to establish on or before 4 January, 1922, passenger fares between Hubbard and Youngstown (*intrastate*) which shall not be less than 20 cents cash, and a 54-ride commutation ticket for $5.00 (R., 20).

On 23 December, 1921, before Carrier had made the prescribed rates effective, Hubbard brought this present proceeding to enjoin Carrier and the Commission.

4. Substance of the Bill.

The substance of the bill (R., 1-6) was that the Report and Order of the Commission was invalid because:—

1. It regulated *intrastate* commerce.

2. It deprived Hubbard of its property without due process of law.

3. It impaired the obligation of a contract.

4. This Carrier was not a common carrier by railroad within the meaning of the Interstate Commerce Act. (This charge was made at bar by leave of Court (R., 6).)

5. The Decision of the Statutory Court.

The Statutory Court (Circuit Judge Donehue, District Judges Westenhaver and Killits) denied the several motions to dismiss and sustained the bill solely upon the ground that the Carrier was not a common carrier engaged in the transportation of passengers or property wholly by railroad within the meaning of the Interstate Commerce Act (R., 29-44); and set aside and annulled the order of the Commission and en-

joined the Commission and the Carrier from putting the said Order into effect (R., 44). The decision was written by Judge Westenhaver, and is reported in 278 Federal Reporter, page 754.

II. SPECIFICATIONS OF ERROR.

The assignments of error (R., 52-55) embrace two contentions:—

1. Whether a high speed interurban electric railroad transporting both freight and passengers in interstate commerce is a common carrier wholly by railroad within the meaning of the Interstate Commerce Act.

2. Whether the Village of Hubbard had a real interest in the controversy, and had any standing to maintain the bill.

III. ARGUMENT.

1. The Facts.

The facts set forth on pages 2 to 8, *supra,* are contained either in the bill and answers, or in the Report and Order of the Commission. Indeed the Statutory Court said (R., 30):—

> The situation is *fully* and *correctly* set forth in the Interstate Commerce Commission's report * * *.

That Court however unconsciously fell into error in holding as a *fact* that the less-than-carload freight service which Carrier operates three days a week between Sharon and New Castle, Pennsylvania (R., 32):—

> is loaded and operated *wholly outside* of the State of Ohio and is transported on a line not owned by defendant.

This was assigned as error (R., 55) because the Commission upon the evidence submitted to it had expressely found that Carrier (R., 18):—

> on three days a week operates a through car between Sharon and New Castle, Pa., *via Hubbard* and the Sharon & New Castle Railroad.

This car had to move from Sharon, Pennsylvania, to Hubbard, Ohio, over Carrier's line, and from Hubbard back again into Pennsylvania to New Castle over the Sharon & New Castle Railroad. This is interstate commerce, *Coe* vs. *Errol* (1886) 116 U. S. 517, 29 L. ed. 715.

There was no attack upon the findings of the Commission that the fares attempted to be fixed by franchise contract resulted in an undue prejudice against *interstate* passengers, and undue preference in favor of *intrastate* passengers, and an unjust discrimination against *interstate*

commerce. The *sole* attack upon the Report and Order was that the Commission had no jurisdiction over Carrier and of the proceeding.

2. The Carrier is a Common Carrier Wholly by Railroad Within the Meaning of the Interstate Commerce Act.

The fundamental error of the Statutory Court was its construction of the provisions of Section 1 of the Interstate Commerce Act as amended (41 Stat. L. 474), holding that the word "carrier" as therein used and defined was limited by certain special definitions of that term inserted by the Transportation Act, 1920, which are applicable *only to certain other specific sections.* After quoting at length the several definitions of "carrier" as used in *specific sections* of the Transportation Act, 1920 (R., 36-37), the Court held (R., 41):—

> Electric street, suburban, or interurban railways are *included* within "common carriers by railroad," as that expression is used in section 1 of the Interstate Commerce Act, *only when they are of that character and engaged in that kind of traffic and under the conditions set forth in the parts of the Interstate Commerce Act and the Transportation Act of 1920 as above quoted. They must be operated as a part or parts of a general steam railroad system of transporta-*

> *tion, or they must be engaged in the general business of transporting freight in addition to their passenger and express business,* or they must be operated as a part of a general steam railroad system of transportation or *engaged in the general transportation of freight.* If they are not thus engaged or being thus operated, they are not within the act, nor within the jurisdiction conferred on the Interstate Commerce Commission, even though they may be engaged in interstate passenger business.*

We shall hereafter discuss this theory of interpretation, and at this place merely point out that if the Court were correct that the term "carrier" or "common carrier by railroad" as used in Section 1 of the Act includes *only* interurban electric carriers as described by it, it was folly for the Congress to have gone to the trouble of *restricting* that term in *specific* Sections of the Act when it purposely intended to *exclude* interurban electric carriers from those Sections. The Court eliminated from the *entire* Act common carriers which the Congress eliminated *only from specific Sections and for specific purposes.*

And we may state parenthetically that these proceedings before the Commission could be sus-

* Italics in all quotations from opinions or statutes are ours unless otherwise noted.

tained, with the exception of a technical procedural provision, *independent of the terms of the Transportation Act, 1920.*

(*a*) THE APPLICABLE SECTIONS OF THE ACT PRIOR TO THE AMENDMENTS OF THE TRANSPORTATION ACT, 1920 AND THE JUDICIAL INTERPRETATION OF SECTION 1.

The following Sections are taken from the Act as amended up to 1918, being found in the pamphlet copy of the Act as revised to June 1, 1918, and printed as a Government publication:

(1) *Sections 1, 2, 3 and 15 of the Act.*

Section 1. "That the provision of this Act shall apply * * * to any *common carrier* or carriers engaged in the transportation of passengers *or* property *wholly by railroad*" in interstate commerce.

Section 2 forbade "*any common carrier* subject to the provisions of *this Act*" to practice unjust discrimination.

Section 3 forbade "*any common carrier* subject to the provisions of *this Act*" from granting undue or unreasonable preferences or advantages to any person, corporation or locality.

Section 15 provided for the establishment of through routes and joint rates and classifications whenever *"the carriers"* failed to do so, but contained this limitation:—

> The Commission shall not, however, establish any through route, classification or rate between *street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business* and railroads of a *different character* * * *.

With the Act in this form, the Commission could have decided the issues in this case, (except for a procedural question, see page 35, *infra*), because the proceedings before the Commission were based on the removal of the discrimination and preference condemned by Sections 2 and 3 of the Act under the Shreveport Doctrine. *Houston, East & West Texas Railway Company* vs. *United States* (1914) 234 U. S. 342, 58 L. ed. 1341; *Adams Express Company* vs. *State ex rel Caldwell* (1917) 244 U. S. 617, 61 L. ed. 1352; *Illinois Central Railroad Company* vs. *Public Utilities Commission* (1918) 245 U. S. 493, 62 L. ed. 425. The conclusions of the Commission in this case were supported by those authorities.

(2) *The Decisions of this Court.*

There is nothing in the Act prior to 1920 to indicate that a *high speed interurban electric railroad* (such as Carrier) is excluded from the phrase "a common carrier * * * wholly by railroad" unless such railroad is either

1. Operated as a part of a general *steam* carrier system; or

2. Engaged in the general business of transporting freight in addition to the passenger and express business,

as stated by the Statutory Court.

The cases decided by this Court are conclusive on this point, not to mention the many cases decided by the Commission to which reference will hereafter be made under an appropriate heading (see pages 47 to 51 *infra*).

The first case to come before this Court involving an interurban electric railroad and the Commission, was *United States* vs. *Baltimore & Ohio Southwestern Railroad Company* (1912) 226 U. S. 14, 57 L. ed. 104. The Commission had ordered a switch connection and also through routes between a *steam* railroad and a Traction Company which Mr. Justice Holmes described as (page 18):—

an "interurban" electric railway for passengers and *some* freight.

The question for decision was whether the Traction Company was a "lateral branch line of railroad" which under *Section 1* of the Act was entitled to a switch connection. This Court held it was not. But this Court refused (page 19) to discuss whether it was a "street passenger railway not engaged in the general business of transporting freight" within the meaning of *Section 15* which was not entitled to a through route.

It seems evident this Court did not at that time consider that interurban electric railroads were without the purview of the Act. If this Court had so thought, then the Commission did not have jurisdiction under any theory of the case.

The next case was *Omaha & Council Bluffs Street Railway Company* vs. *Interstate Commerce Commission* (1913) 230 U. S. 324, 57 L. ed. 1501. The company owned and operated as *one system* two purely *urban* street car companies: one in Omaha, Nebraska, and the other directly across the Missouri River in Council Bluffs, Iowa. It was not authorized to carry freight and did not carry freight. In holding that such an *urban* street railway system was not within the mean-

ing of the Act, Mr. Justice Lamar pointed out the following distinctions between a "railroad" within the meaning of the Act and a *street railway:*—

1. Railroads are constructed on their own property while street railways are constructed on streets.

2. Railroads run from town to town and connect with other railroads, and freight may be transported expeditiously; while street railways serve a single community although that community may be divided by a State line, and do not carry freight.

Under the test there laid down, it is clear that Carrier is a "common carrier wholly by railroad" because:—

1. It is built for the most part on its private right of way and is of standard gauge construction.

2. It operates from Youngstown, Ohio, to Sharon, Pennsylvania, a distance of 14.5 miles and connects both with (*a*) *steam* carriers and (*b*) *electric* carriers so that freight is expeditiously transported.

Indeed in the above decision Mr. Justice Lamar made it clear that this Court expressly refrained

from deciding that an electric interurban carrier was not within the terms of the Act; he said (page 337):—

> But it is said that since 1887, when the Act was passed, a *new type of interurban railroad* has been developed which with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. *We are not dealing with such a case,* but with a company chartered as a street railroad, *doing a street railroad business and hauling no freight.*

There can be no doubt from this language that this Court in 1913 would have held this Appellant Carrier to be a "railroad" within the meaning of the Act.

These two cases are important not only for what they decide, but also for the references made to them by this Court in later cases. The following cases (brushed aside by the Statutory Court) seem to be conclusive that this Court was always of the opinion that high speed interurban electric railroads are within the Interstate Commerce Act.

In *Kansas City Western Railway Company* vs. *McAdow* (1916), 240 U. S. 51, 60 L. ed. 520, this

Court considered a case under the Federal Employers' Liability Act which applied to "every common carrier by railroad while engaged in interstate commerce" (Act of 22 April 1908, Section 1, 35 Stat. L. 65). The defendant was an interurban electric railroad operating from Leavenworth, Kansas, to Kansas City, Missouri, and had a traffic agreement with a street car company in Kansas City over whose tracks it operated. The defendant contended it was not within that act because it was a "street railway company" under the decision of the *Omaha Case*. In sustaining the judgment for the plaintiff, Mr. Justice Holmes said (page 54):—

> The defendant's road appears to be of the class of the traction company that was before the Court in *United States* vs. *Baltimore & Ohio S. W. R. Co.*, 226 U. S. 14, and that was excepted from the decision in *Omaha & C. B. Street R. Co.* vs. *Interstate Commerce Commission*, 230 U. S. 324, 337. Such roads have been held to be within the act of Congress.

In *Spokane & Inland Empire Railroad Company* vs. *United States* (1916), 241 U. S. 344, 60 L. ed. 1037, this Court considered whether an interburban electric railroad was within the meaning of the Safety Appliance Act of 2 March 1893 (27 Stat. L. 531) as amended, particularly by the Act of 2 March 1903 (32 Stat. L. 943), which

required automatic couplers, grab irons, *etc.* on "all trains * * * and similar vehicles used on any *railroad* engaged in interstate commerce" with certain specific exceptions which excluded therefrom "trains, cars and locomotives * * * which are used on *street railways.*" The defendant operated a *street railway* system in Spokane, Washington, and several *interurban* electric railroads, one of which extended to a point in Idaho. The *interurban* railroads were operated separately from the *street railway* although the interurban cars used the latter's tracks and stopped along city streets. Without any discussion this Court treated that electric carrier as a "railroad."

The same electric carrier was again before this Court in *Spokane & Inland Empire Railroad Company* vs. *Campbell* (1916), 241 U. S. 497, 60 L. ed. 1125, which was a proceeding under both the Federal Employers' Liability Act and the Safety Appliance Act. This Court held the electric interburban carrier to be a "railroad" within both acts citing (page 507), among other cases the *Omaha Case.* (See also *International Railway Company* vs. *United States* (1916), 238 Fed. 317 Circuit Court of Appeals, Second Circuit, where Circuit Judge Hough held that the International Railway Company, an electric interurban railroad between Buffalo and Canada,

could be prosecuted as a "railroad" within the meaning of the Safety Appliance Act).

In *Washington Railway & Electric Company* vs. *Scala* (1917), 244 U. S. 630, 61 L. ed. 1360, the action was under the Federal Employers' Liability Act, for damages for the death of plaintiff's decedent. The defendant operated an interurban electric railroad from Washington, D. C. to Cabin John Creek, Maryland, and contended it was a *street railway* and not "a common carrier by *railroad*" within that act. It was held by this Court that the defendant was a common carrier by *railroad*. Mr. Justice Clarke said (pages 637-8):

> With these acts and the evidence and admissions shown in the record before us, it is clear that the defendant was incorporated as, and at the time of the accident complained of was a railway company, not a street railway company; that it had *full powers of eminent domain;* that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John Creek, in the state of Maryland, *a large part of the line being constructed on a private right of way,* and that it was at that time a common carrier of passengers for hire between its termini.
>
> It is argued that under the decision in *Omaha & C. B. Street R. Co.* vs. *Interstate*

Commerce Commission, 230 U. S. 324, the railway of the defendant was a *street railroad*, and that, therefore the defendant was not a "common carrier by railroad" within the terms of the Act of 1908 as amended. *That case dealt with a purely street railway in the streets of two cities*, and the decision was that it was not a "railroad" such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act of 1887. The case is of negligible value in determining either the construction of the act we are considering in this case, or the *classification of the defendant, which clearly enough is a suburban railroad common carrier* of passengers within the scope of the Federal Employers' Liability Act, *as is sufficiently decided* by *United States* vs. *Baltimore & O. S. W. R. Co.*, 226 U. S. 14; *Kansas City Western R. Co.* vs. *McAdow*, 240 U. S. 51; *Spokane & I. E. R. Co.* vs. *United States*, 241 U. S. 344; and *Spokane & I. E. R. Co.* vs. *Campbell*, 241 U. S. 497.

It is to be noted particularly in this case that the interurban electric railroad (1) had power of eminent domain, (2) was built largely on its own private right of way, and (3) *apparently carried no freight.* The Carrier in the case at bar (1) has the power of eminent domain, (2) is built largely on its own private right of way, and

(3) *in addition, does carry freight,* both car load and less-than-carload.

It seems clear, in view of this line of cases, that this Court was clearly of the opinion that an interurban electric railroad, such as Appellant Carrier, was within the terms of the Interstate Commerce Act. In the Federal Employers' Liability Cases this Court cited as authorities the *Omaha Case* and the *Baltimore & Ohio Southwestern Railroad Case* as authorities. The administration of the Safety Appliance Act is under the jurisdiction of the Interstate Commerce Commission. It seems rather odd to contend that an electric interurban railroad is a "railroad" within the Safety Appliance Act and under the jurisdiction of the Commission to that extent at least, but is not a "railroad" within the general provisions of the Interstate Commerce Act.

In distinguishing these Liability and Safety Appliance Cases, the Statutory Court said (R., 40):—

> The reason for these holdings is that exceptions within a remedial statute are to be strictly construed, *etc.*

There were no express exceptions in these statutes. The only question was whether *interurban electric railroads* were common carriers by

railroad within the meaning of the statutes. With the aid of the Interstate Commerce Cases, this Court held they were.

We do not believe the Federal Employers' Liability Act and the Safety Appliance Act are more remedial than the Interstate Commerce Act. The Safety Appliance Act is a penalty statute and should be strictly construed. Indeed the Interstate Commerce Act has been held to be remedial legislation. In *New York, New Haven & Hartford Railroad Company* vs. *Interstate Commerce Commission* (1906), 200 U. S. 361, 50 L. ed. 515, Mr. Justice White said (page 391):—

> It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, *was to secure equality as to all, and to destroy favoritism,* these last being accomplished by requiring the publication of tariffs and by prohibiting secret departure from such tariffs, and forbidding rebates, preferences, and all other forms of *undue discrimination.* To this extent and for these purposes the *statute was remedial* and is, therefore, *entitled to receive that interpretation which reasonably accomplishes the public purpose which it was enacted to subserve.*

The construction of the Act by the Statutory Court runs counter to such an interpretation. It

continues and perpetuates an undue prejudice and unjust discrimination against *interstate* passengers, and an undue preference in favor of *intrastate* passengers. The decision perpetuates this condition:—

Interstate passengers pay per mile	*Intrastate passengers pay per mile*
Cash . . . . . 2.79 cents	1.37 cents
Round trip. 2.79 "	1.14 "
Special ticket abolished	1.04 "
Commutation 1.29 cents	0.81 "

and makes the *interstate* passenger traffic (38.3 per cent of the total passenger traffic) bear 55.5 per cent of the total passenger revenue (R., 18). This situation can not be defended. It was condemned by the Commission as an "unjust discrimination against interstate commerce" (R., 19).

State Courts were of the opinion that this Court considered interurban electric railroads as "common carriers wholly by railroad" within the meaning of the Interstate Commerce Act, as well as "railroads" within the Federal Employers' Liability Act and the Safety Appliance Act. This is well shown in the opinion of the Supreme Court of West Virginia in *Shrader* vs. *Stueben-*

ville, East Liverpool & Beaver Valley Traction Company (1919), 99 S. E. 207, P. U. R. 1919 D 895. The plaintiff had an old contract with defendant which entitled him to free passage over the bridge which defendant used in transporting its traffic from Ohio to West Virginia. The defendant abolished the free passage and plaintiff brought this bill to enforce his contract. The Court in sustaining the dismissal of the bill said the record did not show whether defendant was only a street railway or an interurban line. But held that if it was an *interurban line,* then it was within the Interstate Commerce Act and could abolish the free passage. After discussing the decisions of this Court to which we have referred, Mr. Justice Lynch said:—

> Hence, if the fact had appeared that an *interurban electric railway* carrying passengers and freight or express passed over the bridge in question, the latter could be said to be used or operated in connection with a "railroad," and as such would be subject to the provisions of the Act to Regulate Commerce.*

To summarize briefly, it seems evident from the foregoing discussion that prior to 1920, every

* See also: *Heaton* vs. *Washington & Rockville Railway Company,* P. U. R. 1919, C, 106, where the Maryland Public Service Commission held that interurban electric railroad to be under the jurisdiction of the Interstate Commerce Commission.

"common carrier by railroad" was subject to *all the provisions* of the Interstate Commerce Act (not to certain specific sections) and that phrase *included a high speed interurban electric railroad,* such as this Carrier.

The question is: Did the Transportation Act, 1920, so amend the Interstate Commerce Act as to eliminate from the *entire Act* such interurban electric railroads?

(*b*) THE PRINCIPAL SECTIONS OF THE ACT AS AMENDED BY THE TRANSPORTATION ACT, 1920.

In discussing the effect of these amendments, the Statutory Court said (R., 35):—

> The Transportation Act of 1920 leaves the provisions of the Act as to the *carriers* subject to the jurisdiction of the Commission *as they were in these previous acts,* but refers more frequently to street or suburban and interurban electric railways *in order to exclude them from the purview of certain provisions and sections of the Act;*

but held that inasmuch as the Congress did intend to exclude interurban railroads from "certain provisions and sections of the Act," it therefore follows that the Congress intended to exclude them for the *entire Act.* This conclusion is reached although the Court expressly

found that the Congress intended to leave "the provisions of the Act as to *carriers* subject to the jurisdiction of the Commission, *as they were in these previous Acts.*" This is, we believe, an erroneous theory of statutory construction.

Section 1 of the Act, as amended in 1920, provides:—

> (1) That the provisions of *this Act* shall apply to common carriers engaged in:—
>
> (*a*) The transportation of passengers *or* property wholly by *railroad*

in interstate commerce, which was the *same provision* in the earlier Acts. Here it is pertinent to note two points:—

1. The *entire Act* (not a part of it) applies to common carriers as thus defined.

2. A common carrier as thus defined is one which is engaged in "the transportation of passengers *or* property wholly by railroad," and not, as construed by the Statutory Court, engaged in the transportation of passengers *and* property.

The Congress, in 1920, knew that both this Court and the Commission had construed the word "railroad" to include *interurban electric railroads* and re-enacted this portion of Section

1 *without* change. It is a well settled principle of construction that where a statute which has been construed by the Courts has been re-enacted by the Congress in the same or substantially the same terms, the Congress is presumed to have been familiar with such construction and to have adopted it as a part of the statute. *United States* ex rel. vs. *Interstate Commerce Commission* (1918), 246 U. S. 638, 644, 62 L. ed. 914.

The same rule is applied by this Court to *administrative* interpretation of an act by the administrative agency whose duty it is to enforce that act. This rule was announced by this Court in *United States* vs. *Cerecedo Hermanos Y Compania* (1908), 209 U. S. 337, 52 L. ed. 821, Mr. Justice McKenna saying (page 399):—

> And we have decided that the *re-enactment* by Congress, without change, of a statute which had previously received long continued *executive* construction, is an adoption by Congress of such construction. *United States* vs. *Falk,* 204 U. S. 143, 152.

The Statutory Court entirely ignored these rules of construction.

Another cardinal rule of statutory construction is that where the Congress uses broad and sweeping language in an act and subsequently in that

act expressly excludes certain subjects for *specific purposes,* it is clear the Congress intended those subjects to be included within the broad language for *general* purposes. This rule is well stated in *Lewis' Sutherland Statutory Construction* (2nd ed.), Volume II, page 670-672:—

> It has not been an unfrequent mode of legislation to frame an act with general language in the *enacting clause,* and to restrict its operation by a proviso. It is often found difficult to limit the language in the enacting clause so as to admit every exception or limitation designed to be introduced into the section in its finished state. Provisos and *exceptions* are similar; *intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.* * * * The effect of an exception which is a part of the enacting clause and is of general application is simply to restrict it as to the matter excepted. It operates for this purpose co-extensively with the matter which precedes. * * * The *exception* of a particular thing from the operation of the general words of a statute shows that in the opinion of the law-maker the *thing excepted would be within the general words had not the exception been made.* Consequently if the statute is amended by striking out the exception, the intent is clear to put the ex-

> cepted thing within the operation of the general words. An exception is not universally so extensive as the provision which it qualifies, as to subject-matter, for its purpose may be, and usually is, to reduce the subject-matter by withdrawing a part from the operation of the general words, or to give them a qualified operation merely *as to the matter of the exception.* Where there is a prohibition, grant or regulation in *general words* and a *saving of particular things,* there is a strong implication that *what is excepted would have been within the purview if it had not been excepted;* and thus the *purview may be made more comprehensive than it would otherwise have been.**

For the convenience of this Court in the application of the above cardinal principles of statutory construction, we set forth at some length (pages 31 to 39) the principal sections of the Act as amended by the Transportation Act, 1920, showing those sections and parts of sections which (1) apply to *all* carriers and (2) apply only to *specific types* of carriers.

Section 1 grants to the Commission additional powers and duties. In paragraphs (18) to (21),

* Citing among other authorities, the celebrated decisions of *Gibbons* vs. *Ogden* (1824), 9 Wheat. 1, 6 L. Ed. 1, and *Brown* vs. *Maryland* (1827), 12 Wheat. 419, 6 L. ed. 678.

it was provided that no extension or abandonment could be made by a "carrier by railroad" unless with permission of the Commission. But in order to *exclude* from these *specific* paragraphs of Section 1 certain matters and carriers which the Congress thought would otherwise be included, it was expressly provided that:—

> (22) The authority of the Commission conferred *by paragraphs* (18) to (21) both inclusive, shall not *extend* to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban or *interurban electric railways* which are not operated as a part or parts of a general steam railroad system of transporttion.

Here it will be noted that an interurban electric railway transporting *both* passengers *and* property is excluded *unless* it is a part of steam carrier system.*

Section 2 prohibits *"any common carrier subject to the provisions of this Act"* from practicing unjust discrimination. There is no exception as to the class of carrier mentioned in Section 1 (1) of the Act and this indicates clearly that the Con-

* See: *Application of Michigan United Railways Company* (1921), 67 I. C. C. 452, where the Commission held an interurban electric railroad was excluded from paragraphs (18) to (21) of Section 1.

gress intended to include these *high speed inter-urban electric railways* (such as this Carrier) within this prohibition.

Section 3 prohibits *"any common carrier subject to the provisions of this Act"* from making or giving an undue preference or advantage. There is no exception of certain carriers from this prohibition.

Section 4 prohibits *"any common carrier subject to the provisions of this Act"* from violating the long and short haul provisions. Again no exception.

Section 5 (1) prohibits *"any common carrier subject to this Act"* from pooling freight without approval by the Commission.

(2) Allows "any common carrier or carriers engaged in the transportation of passengers *or* property" to acquire control by lease, stock ownership or otherwise of "any other such carrier or carriers" with approval by the Commission.

But in paragraphs (4) to (11) of Section 5 which govern the consolidation of carriers it seems clear that the Congress was dealing only with general *steam* railroad systems for the plan

is to consolidate only "the railway properties of the continental United States."

Section 6 provides that *"every common carrier subject to the provisions of this Act"* shall file and post tariffs and change rates in the manner set forth. Again no exception.

Section 7 makes it unlawful for *"any common carrier subject to the provisions of this Act"* to prevent continuous freight carriage. Again no exception.

Section 8 provides for the civil liability of *"any common carrier subject to the provisions of this Act."* Again no exception.

Section 9 provides for the filing of a complaint with the Commission or with the Courts against *"any common carrier subject to the provisions of this Act."* Again no exception.

Section 10 provides for penalties to be suffered by *"any common carrier subject to the provisions of this Act"* for violations of the Act. Again no exception.

Section 12 confers upon the Commission "authority to inquire into the management and business of *all common carriers subject to the provisions of this Act."* Again no exception.

Section 13 provides in (1) for the filing of complaints with the Commission complaining of anything done or omitted to be done *"by any common carrier subject to the provisions of this Act."* Again no exception.

And in Section 13 (3) and (4), specific authority is given to the "carrier concerned" to petition the Commission to investigate any rate, fare or charge, "made or imposed by the authority of any State," and if the Commission finds that such rate *etc.*, causes any undue preference or advantage to *intrastate* commerce or discriminates against *interstate* commerce, it is the duty of the Commission to prescribe the rates to be charged thereafter so that the preference and discrimination shall be removed "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

These two paragraphs of Section 13 authorized this proceeding before the Commission by Carrier. But neither one was absolutely necessary to support the order made. Carrier could have had a complaint filed against it by an *interstate passenger* and the issues decided, as was done in *Beall* vs. *Wheeling Traction Company* (1921), 60 I. C. C. 600, on re-argument, 63 I. C. C. 220, prior to this amendment to Section 13.

Paragraph (4) of Section 13 is only a legislative declaration of the Shreveport Doctrine which was announced by this Court in 1914, and was not necessary for the disposition of this case.

Carrier is therefore on firm ground when it states that the issues before the Commission could have been adjudicated without reference to any provision of the Act as amended by the Transportation Act, 1920.

Section 15 (1) grants to the Commission power to regulate the rates, *etc.*, charged *"by any common carrier or carriers subject to the provisions of this Act* for the transportation of persons *or* property."

Paragraph (3) contains the same limitation in the earlier act that the Commission can not establish a through route, etc., "between *street electric passenger railways* not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." As we have previously pointed out (*supra,* page 16), this Court never considered that clause to eliminate *electric interurban railroads* from the *entire* Act.

Section 15a (new) deals with the establishment of rates for *groups* of *steam* railroad systems,

and we find that the Congress specifically defined the word "carrier" when *"used in this Section"* so as to exclude from *this section*:—

(*a*) Sleeping car companies and express companies,

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation,

(*c*) *Interurban electric railways* unless operated as a part of a general steam railroad system of transportation *or* engaged in the general transportation of freight, and

(*d*) Any belt-line railroad, terminal, switching railroad, etc.

It will be noted that the same exception which excludes *from Section 15a,* interurban electric railways transporting *only passengers,* also excludes "sleeping car companies and express companies" which no one would ever contend were not within the *general provisions of the Act.* (See Section 1 (3) of the Act.)

Section 19a provides for the valuation of the property owned or used by *"every common carrier subject to the provisions of this Act."* Here there is no exception.

Section 20 provides that the Commission may require annual reports *etc.,* from *"all common carriers subject to the provisions of this Act, and*

from the owners of all railroads engaged in interstate commerce as defined in this Act." No exception is here inserted, and it is well known that the Commission has for years required a special form of report from electric carriers.

Section 20a (new) governs the issuance of securities and was expressly limited to certain types of carriers, namely *steam* railroad systems. This is so because "carrier" is defined for the purpose of "this Section" as "a common carrier by railroad * * * which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." This definition alone excludes "pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies" (Section 1 (3)), and certain water carriers (Section 1 (2c), which are all subject to *general provisions* of the Act.

But the Congress was not content with the exclusion of only the above carriers *from this Section 20a.* In addition it expressly excluded by name:—

> a street, suburban or interurban electric railway which is not operated *as a part* of a general *steam* railroad system of transportation which is subject to this Act."

Here it will be noted that even an electric interurban railway *engaged in the genral transportation* of freight (which the Statutory Court considered to be *within* the Act) is excluded unless operated as a part of a general *steam* carrier. Surely the Congress would not have gone to this trouble to exclude *all* independent interurban electric carriers from this *particular* Section 20a if it had not considered that they were under the *general* provisions of this Act.

Section 25 (new) governs foreign shipping and applies only to "any common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States." This excludes all other types of "common carriers."

Section 26 (new) governs the installation of train stop or control and other safety devices and applies to *"any carrier by railroad subject to this Act."* There is no exception here.

We have set forth in detail the principal Sections of the Act as amended in 1920 because we feel that such an analysis conclusively proves:—

1. That the Congress in 1920 realized that this Court and the Commission had construed the phrase "common carrier wholly by railroad" to include these well known interurban electric railroads.

2. That the Congress adopted that construction and intended to include within the *general* provisions of the Act interurban electric railroads whether they transported both passengers *and* freight, or only passengers, or only freight. The Act specifically covers the transportation "of passengers *or* freight," (Section 1 (*a*)), and there is no warrant for the Statutory Court's theory that an electric carrier must transport both passengers *and* freight.

3. That there is no legislative provision in Sections 1, 2, 3 and 13 of the Act (the Sections necessarily involved in the proceedings before the Commission) to exclude therefrom this Carrier which operates a high speed interurban electric railroad and transports both property *and* freight.

The Statutory Court thought it found support for its conclusion in Section 209 of the Transportation Act, 1920 (R., 37). This Section provided a guaranty for a limited time to the carriers which had been *under Federal control.* It excluded from that *specific Section,*

> a street or interurban electric railway *not under Federal Control* at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban

> or interurban passenger traffic or sale of power, heat and light, or both.

This Section however does not exclude all interurban electric carriers. It excludes only an interurban electric railroad which (1) was *not* under Federal control on 28 February, 1920, and (2) had as the principal source of its operating income the designated services.* This Section can not lend any support to the conclusion reached.

The Statutory Court also cited in support of its construction, Title III of the Transportation Act, 1920, which provides for the Labor Board. Section 300 defined a "carrier" for the purpose of *"this title,"* to include,

> any express company, sleeping car company, and *any carrier by railroad, subject to the Interstate Commerce Act,* except a street, *interurban,* or suburban electric railway not operating as a part of a general *steam* railroad system of transportation.

This legislative definition excluded every interurban electric railroad which was operated separately even though it transported both pas-

*The Commission has recognized this express legislative exclusion, *Guaranty Status of Central California Traction Company* (1922), 72 I. C. C. 167. Such an interurban electric carrier is also expressly excluded from Section 204 of the Transportation Act, 1920, by the same legislative definition, *Deficit Status of Galesburg & Western Railroad Company* (1922), 72 I. C. C. 807.

sengers *and* freight, and derived 95 per cent. of its operating revenue from the *freight* traffic.* Yet such a carrier, under the theory of the Statutory Court, is within the general provisions of the Interstate Commerce Act.

If the Congress had not considered that an *interurban* electric railroad was "subject to the Interstate Commerce Act," it seems evident it would not have gone to the trouble of *expressly* excluding it from Title III of the Transportation Act, 1920. The exception is meaningless unless an interurban electric railroad was considered by the Congress to be a "carrier by railroad, subject to the Interstate Commerce Act."

It therefore seems evident that the Statutory Court erred in holding that *all interurban electric railroads* engaged in interstate commerce were excluded from *all* the provisions of the Interstate Commerce Act unless they meet the following conditions set forth by it (R., 41):

> "(1) They must be operated as a part or parts of a general steam railroad system of transportation; or
>
> "(2) They must be engaged in the general business of transporting freight in addition to the passenger and express business."

* See: Decision No. 33—Docket 26-A of the Labor Board, Vol. I, page 53.

Under this theory of interpretation the Statutory Court held that *specific* exceptions in *specific* Sections of the Act exclude from the *general* terms of the *entire* Act all subjects mentioned in the *exceptions*. It cited no authority for this rule of construction. We know of none. We earnestly submit that the Staturtory Court was clearly wrong in its theory of interpreting the Act.

3. This Carrier is Engaged in the General Transportation of Freight in Addition to its Passenger and Express Business.

Even if we concede (which we do not) that the Statutory Court was correct in its interpretation of the Act, yet that Court erred because Carrier is engaged in general transportation of freight.

The Commission found as a fact that (R., 18):

(1) Carrier has two connections with the New York Central over which it received in 1919 and 1920, 922 car loads of freight for delivery along its lines.

(2) These connections with the New York Central give it access to the trunk line carriers.

(3) Carrier participates with other electric railroads in through rates to Detroit, Michigan and other points.

(4) Carrier operates a daily less-than-carload freight service between Sharon and Youngstown (*interstate*) and on three days a week a similar service between Sharon and New Castle *via* Hubbard and the Sharon & New Castle Railroad (*interstate*). It transported in 1919 and 1920, 11,714 tons of such freight.

(5) Carrier's total freight revenue for 1919 and 1920 was about 7 per cent. of its gross revenue being made up of:

	1919	1920	Total
Carload and Switching	$ 6,246	$ 5,259	$11,505
L C L	18,000	21,221	39,221
	$24,246	$26,480	$50,726

The Statutory Court brushes these findings (relative to the less-than-carload freight service) aside with the mere statement that:—

> * * * *this freight service appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic.* In any event, the amount, thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and *relatively insignificant and unimportant freight business* cannot be called the general transportation of freight in *addition to its express business.*

This is cited as error (R., 54) because the Court does not point to any portion of the Report of the Commission which justified it in saying that the less-than-carload freight "appears to have consisted of packages and parcels and is more nearly like that which is called express than freight traffic." Its only authority for this statement is (R., 32):—

> *Plaintiff asserts* * * * that its (Carrier's) less-than-carload freight from Youngstown to Sharon consists, in reality, only of parcels or packages more nearly akin to express service than to freight service.

The Commission found as a fact that *all* such shipments (not merely those from Youngstown to Sharon) were less-than-carload freight shipments, and the Court went far beyond its powers in holding as a fact that they were not. In the first part of the opinion the Court said that the "situation is fully and correctly set forth in" the Report of the Commission (R., 30) and yet in the face of that statement and solely upon the assertion of the plaintiff at argument (with all due respect to counsel) finds as a *fact* (R., 42) that the less-than-carload freight shipments were not what the Commission found them to be.

In railroad parlance the term "less-than-carload freight service" has a definite meaning and

is entirely different from *express* service.* It is typically a freight service. This finding of fact was amply supported by the record before the Commission and *this finding was conclusive upon the Court. Manufacturers Railway* vs. *United States* (1918), 246 U. S. 457, 481, 62 L. ed. 831; *Seaboard Air Line Railway Company* vs. *United States* (1920), 254 U. S. 57, 62, 65 L. ed. 129.

The Statutory Court was also of the opinion that merely because this less-than-carload freight service only produced about 5 per cent. of the gross revenue, it was "relatively insignificant freight business." With all due respect to the Court we respectfully ask: What per cent. of the gross revenue must the car load and less-than-carload freight business produce before it is significant? Must it be 10, 15, 25, 30 or 51 per cent. of the gross revenue? We respectfully submit that such a conclusion of the Court was arbitrary.

Merely because Carrier did not in 1919 and 1920, transport more freight than it did, does not in any manner show that it was not *engaged* in the general transportation of freight. The Commission found as a fact that Carrier did trans-

* For example, express service includes a pickup and delivery service at the terminals. See: *In the Matter of Express Rates, Practices, etc.* (1912), 24 I. C. C. 381, 425.

port carload and less-than-carload freight and this finding shows that it was *engaged* in the general transportation of all kinds of freight. The revenue produced by freight shipments is no criterion of the scope of its freight transportation service.

While it is true Carrier does not originate car load freight traffic which it delivers to steam carriers (R., 18) yet this does not support any conclusion that it is not in the general transportation of freight. Most terminal railroads receive more freight from other carriers than they originate and deliver to other carriers. Yet they are common carriers under the jurisdiction of the Commission. See *Manufacturers Railway Company* vs. *United States, supra,* page 46.

We respectfully submit that upon the facts as found by the Commission, the Statutory Court was in error in holding that Carrier was not engaged in the general transportation of freight.

4. The Statutory Court was Bound to Adopt the long Continued Administrative Interpretation of the Act which had Been Adopted by the Congress.

It is a cardinal rule of statutory construction that Courts should accord great weight to the interpretation of an act adopted by the adminis-

trative tribunal whose duty it is to enforce that act. *National Lead Company* vs. *United States* (1920), 252 U. S. 140, 146, 64 L. ed. 496. The rule was recently stated in *McLaren* vs. *Fleischer* (1921), 256 U. S. 477, 65 L. ed. 1052 in sustaining an interpretation of the Homestead Law by the Land Department. After indicating the several possible interpretations of that act, Mr. Justice Van Devanter said (page 480-1):—

> In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it *before the present controversy arose or was thought of;* and, except for a departure soon reconsidered and corrected, *they have adhered to and followed it ever since.* Many outstanding titles are based upon it, and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given an act of Congress fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect, and, *if acted upon for a number of years,* will not be disturbed except for cogent reasons.*

In the Appendix (see page 56, *infra*), we have attached a partial list of cases of the Com-

* Citing many cases in a foot note.

mission in which it has held and treated such interurban electric railroads as within its jurisdiction. This interpretation was placed upon the Act:—

1. As early as 1897 by the Commission in construing the provision "common carriers wholly by railroad."*

2. Has been adhered to and followed ever since.

3. Has been accepted for many years by these interurban electric railroads which have adjusted their service, rates, accounting and rules to meet the Commission's orders.

The Commission has regulated these interurban electric railroads for such a long period and those carriers have adjusted themselves to such regulation that untold confusion and hardship would result if the Commission were not now sustained.

The above principle of construction is applicable not only to interpretations by the Land Department, but also to interpretations by the Treasury Department of the tariff laws, *United States* vs. *Cerecedo Hermanos Y Compania, (supra,* page 29), and of the tax laws, *Lincoln Chemical Company* vs. *Edwards* (1923), 289 Fed.

* *Willson* vs. *Rock Creek Railway Company* (1897), 7 I. C. C. 83.

458 (Circuit Court of Appeals, Second Circuit). There is every sound reason why it should apply to an administrative interpretation of the Interstate Commerce Act by the Commission.

In addition to the above rule of construction, this Court definitely held in *United States* vs. *G. Falk & Brother* (1907), 204 U. S. 143, 152, 51 L. ed. 411; *United States* vs. *Cerecedo Hermanos Y Compania; National Lead Company* vs. *United States, supra,* pages 29 and 48, that where a Federal statute has received a long-continued construction by the administrative agency whose duty it is to enforce the statute, *and the Congress re-enacts the statute without change,* that construction is adopted by the Congress. Applying that principle to this case we find:—

1. Almost from the very beginning the Commission has construed the phrase "common carrier wholly by railroad" in Section 1 of the Act to include *electric interurban railroads.*

2. From the *Omaha Case* to date this Court has adopted the same construction.

3. The Congress in 1920 re-enacted Section 1 without changing this phrase. And in addition to this adoption of the administrative and judicial

construction, the Congress made *specific exceptions* of certain interurban electric railroads from certain *specific sections* (see *supra,* pages 31 to 39), which clearly show that it advisedly adopted that long continued construction.

In view of these principles, we submit, the Statutory Court when it was in doubt, was bound to adopt this long-continued administrative (and judicial) construction placed upon the phrase "common carrier wholly by railroad," especially after the Congress expressly adopted it.

5. The Plaintiff was Without Interest in the Controversy and Could not Maintain the Bill.

In the motion to dismiss the bill this reason was asserted (R., 21). Hubbard's only interest in this controversy was that it had a franchise contract with Carrier which it alleged was binding upon the Commission. It has no property interest which is involved.

In *Worcester* vs. *Worcester Consolidated Street Railway Company* (1905), 196 U. S. 539, 49 L. ed. 591, this Court held that a municipal corporation is only a creature of the State and cannot invoke the contract clause of Article I, Section 10 of the Federal Constitution against the *State* where the latter has abrogated, with consent of the

company, a street paving contract between the municipality and the company. If this be true of a controversy between the municipality and the *State,* it is also true of a controversy between the municipality and the *Nation,* because the Congress is not so restricted by that provision of the Constitution or any other provision. *New York* vs. *United States* (1922), 257 U. S. 591, 601, 66 L. ed. 385.

Mr. Chief Justice Taft in that case clearly pointed out that where the Congress in the effective regulation of interstate commerce authorizes a rate prescribed in a *State constitution or charter* to be increased, the State can not allege a deprivation of property without due process of law. It does not seem conceivable that a *village ordinance* (enacted after the enactment of the Interstate Commerce Act) has greater sanctity than a State constitution or charter.

In *Oklahoma* vs. *Atchison, Topeka & Sante Fe Railway Company* (1911), 220 U. S. 277, 55 L. ed. 465, the State brought an original bill in this Court to prevent the company from charging certain rates which were higher than the rates charged in Kansas on similar commodities, claiming the rates to have been fixed by an act of the Congress. In dismissing the bill, Mr.

Justice Harlan pointed out that no property rights of the State were involved, and that (page 287):—

> It seeks only, as between the railway company and the shippers, by a general comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all** of the people who may have occasion to ship such commodities over the railway.†

Inasmuch as this Court has distinctly held that a municipality can not assert any contractual or property right in its franchise as against the Congress, it follows that Hubbard's *entire* interest in this controversy was to compel Carrier to respect the asserted rights of all the inhabitants of Hubbard or Youngstown who may have occasion to travel back and forth over Carrier's line. Such an interest is not sufficient to give it standing to maintain this bill.

The Statutory Court held that Hubbard had a sufficient interest because (R., 33):—

1. It was a party to the proceedings.

2. It was a party to the franchise, the rates of which were increased by the Commission.

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* Italics were inserted by this Court.
† See also: *North Dakota* vs. *Chicago & Northwestern Railway Company* (1922), 257 U. S. 485, 489, 66 L. ed. 329.

Merely because Hubbard appeared before the Commission does not justify its institution of this suit. The City of Youngstown also appeared and yet it could not be claimed that it had standing to maintain the bill. To maintain a bill to annul an Order of the Interstate Commerce Commission, the plaintiff must have a *real interest* which has been jeopordized. *Edward Hines Yellow Pine Trustees* vs. *United States* (1923), U. S. , 68 L. ed. 56. Hubbard had none.

The Court cited *New York City* vs. *United States* (1921), 272 Fed. 768 to sustain its second reason. While it is true the Court in that case did justify the City's position on the ground that it had a franchise contract with one of the defendants the rates of which were increased, yet it also found that the City had an interest in the controversy "as a shipper and receiver of milk and cream for its institutions." This fact seems to be the sound basis for the decision, and this fact is lacking in the case at bar.

We therefore submit that the Statutory Court erred in not sustaining the motion to dismiss the bill because Hubbard had no real interest in the controversy, and had no standing to maintain the bill.

IV. CONCLUSION.

We cannot close this brief without pointing out to this Court the equities of this case, and the results which will flow from an affirmance of this decree.

The so-called franchise rates attempted to be prescribed 23 years ago are seriously interfering with interstate commerce. In 1920 Carrier had a *deficit* of $12,902, before depreciation and renewal reserves, in the transportation of passengers, although the *interstate* traffic had a *profit* of $18,362 (R., 17).

Unless this decree is reversed, the various States will be permitted eventually to strangle interstate commerce transported over these interurban electric railroads. Each State will compete in the race for preferences and advantages in both passenger and freight traffic on these electric carriers. The result can only be chaos and then oblivion for these electric carriers which are increasingly taking a larger and larger part in National transportation.

The Carrier earnestly submits that this Court should reverse the final order and decree of the Statutory Court with directions to dismiss the bill at the cost of the plaintiff.

Respectfully submitted,

DOUGLASS D. STOREY,
U. C. DEFORD,
Solicitors.

APPENDIX.

CHRONOLOGICAL LIST OF CASES DECIDED BY INTERSTATE COMMERCE COMMISSION HOLDING OR TREATING INTERURBAN ELECTRIC RAILROADS WITHIN ITS JURISDICTION.

Willson vs. *Rock Creek Rwy. Co.* (1897), 7 I. C. C. 83;

Chicago & Milwaukee R. R. vs. *Illinois Central R. R.* (1907), 13 I. C. C. 20;

Cedar Rapids & Iowa City Rwy & Light Co. vs. *Chicago & Northwestern Rwy. Co.* (1908), 13 I. C. C. 250;

Beal vs. *Washington, Alexandria & Mt. Vernon Rwy. Co.* (1911), 20 I. C. C. 406;

C. & C. Traction Company vs. *B. & O. S. W. R. R.* et al. (1911), 20 I. C. C. 486;

Citizens of Somerset, etc. vs. *Washington Rwy. & Elec. Co.* (1911), 22 I. C. C. 187;

Silvester, et al. vs. *City & Suburban Rwy. Co.* (1912), 22 I. C. C. 201;

Bilzer vs. *Washington-Virginia Rwy. Co.* (1912), 24 I. C. C. 255;

Ford vs. *Washington-Virginia Rwy. Co.* (1912), 24 I. C. C. 632;

St. Louis, Springfield & Peoria R. R. vs. *Peoria & Pekin Union Rwy. Co.* (1913), 26 I. C. C. 226;

Louisville Board of Trade vs. *Indianapolis, etc. Traction Co.,* et al. (1913), 27 I. C. C. 499;

Jurisdiction over Urban Electric Lines (1915), 33 I. C. C. 536;

Chicago, Ottawa & Peoria Rwy. Co. vs. *C. & N. W. Rwy. Co.* (1915), 33 I. C. C. 573;

Stuebenville vs. *Tri-State Rwy. & Elec. Co.* (1916), 38 I. C. C. 281;

Knapp Supply Company vs. *Ohio Electric Rwy. Company* (1916), 38 I. C. C. 627;

St. Louis, Mo.-Illinois Passenger Fares (1916), 41 I. C. C. 584;

Lourie Mfg. Co. vs. *Cincinnati Northern R. R. Co.,* et al. (1916), 42 I. C. C. 448; aff. (1918) 49 I. C. C. 64;

Gasoline from Coffeyville, Kansas (1917), 43 I. C. C. 98;

Michigan Railway Co. vs. *Michigan Central R. R.* (1918), 49 I. C. C. 255;

Aurora, Elgin & Chicago R. R. Co. vs. *Indiana Harbor Belt R. R. Co.* (1918), 51 I. C. C. 331;

East Liverpool vs. *Stuebenville, East Liverpool & Beaver Valley Traction Company* (1918), 51 I. C. C. 563;

Hurst vs. *Boise Valley Traction Company* (1918), 51 I. C. C. 697;

Louisville Passenger Fares (1919), 52 I. C. C. 366;

St. Louis Electric Terminal Rwy. Co. vs. *C. C. & C. St. L. Rwy. Co.*, et al. (1919), 55 I. C. C. 52; (1920) 58 I. C. C. 597;

Newspapers on Passenger Cars (1920), 57 I. C. C. 743;

Badger Lumber Co. vs. *Kansas City Rwy. Co.*, et al. (1920), 58 I. C. C. 97;

Chicago, Lake Shore & S. Bend Rwy. Co. vs. *Director General*, et al. (1920), 58 I. C. C. 135;

Ex parte 74 (1920), 58 I. C. C. 220, 253;

Local Fares of Hudson & Manhattan R. R. Co. (1920), 58 I. C. C. 270;

Electric Railway Mail Pay (1920), 58 I. C. C. 455;

Chicago, Lake Shore & S. Bend Rwy. Co. vs. *Director General*, et al. (1920), 58 I. C. C. 647;

Cancellation of Joint Class Rates from Toledo & Western R. R. Co. (1920), 59 I. C. C. 122;

Joint Passenger Fares (Interstate Consol. St. Rwy. Co. and Rhode Island Company) (1920), 59 I. C. C. 170;

United Iron Works, Inc. vs. *Director General*, et al. (1920), 59 I. C. C. 312;

Class & Commodity Rates of Kansas City Railways Company (1920), 59 I. C. C. 382;

Cancellation of Joint Through Freight Rates in connection with Missouri & Kansas Rwy. Co. (1920), 59 I. C. C. 404;

Local & Joint Passenger Rates (Wheeling Railway Company) (1920), 59 I. C. C. 430;

Switching & Absorption at Paris, S. C. (Piedmont & Northern Rwy. Co.) (1921), 60 I. C. C. 210;

Badger Lumber Co. vs. *Sante Fe Rwy.*, et al. (1921), 60 I. C. C. 278;

South Carolina Fare & Charges (1921), 60 I. C. C. 290, 294;

Beall vs. *Wheeling Traction Company* (1921), 60 I. C. C. 600; aff. 63 I. C. C. 220;

Electric Coal Co. vs. *Director General*, et al. (1921), 60 I. C. C. 683;

Greater Belleville Board of Trade vs. *East St. Louis & Suburban Rwy. Co.* (1921), 60 I. C. C. 741;

W. B. A. Commuters Club vs. *Washington, Balt. & Annapolis Electric R. R. Co.* (1921), 61 I. C. C. 302;

Intrastate Fares of Chicago, North Shore & Milwaukee R. R. Co. in Illinois (1921), 62 I. C. C. 188;

Fares of Washington-Virginia Rwy. Co. (1921), 62 I. C. C. 200;

Gillespie Coal Co. vs. *Illinois Traction System* (1921), 62 I. C. C. 335;

Matter of Intrastate Fares of Chicago, North Shore & Milwaukee Railroad in Illinois (1921), 62 I. C. C. 188;

Fares of Washington-Virginia Railway Company (1921), 62 I. C. C. 200;

Kansas Rates, Fares, Charges (Joplin & Pittsburgh Railway Company) (1921), 62 I. C. C. 440;

Cement to Washington, Baltimore & Annapolis Electric Railroad Stations (1921), 63 I. C. C. 264;

New Albany vs. *Louisville & Northern Railway & Lighting Company* (1921), 64 I. C. C. 468;

Ohio Rates, Fares & Charges (The Pennsylvania-Ohio Power & Light Company) (1921), 64 I. C. C. 493;

Ohio Rates, Fares & Charges (Steubenville, E. L. & B. V. Traction Co.) (1921), 64 I. C. C. 517;

Intrastate Rates within Illinois (1922), 66 I. C. C. 350;

Cancellation of Class Rates from Indiana to Ohio via Terre Haute, Ind. & Eastern Traction Company (1922), 66 I. C. C. 449;

Indiana Passenger Fares & Charges (1922), 69 I. C. C. 180;

Providence Fruit & Produce Company vs. *Rhode Island Company* et al, (1922), 69 I. C. C. 422;

Buckeye Pipe Line Co. vs. *B. & O. R. R.*, et al. (1922), 73 I. C. C. 19;

Hood Coal Company vs. *Monongahela Power & Railway Co.* (1922), 73 I. C. C. 54;

Michigan Railroad Company vs. *Pere Marquette*, et al. (1922), 74 I. C. C. 496;

Farmers Square Deal Grain Company, et al. vs. *Fox & Illinois Union Rwy. Co.*, et al. (1922), 74 I. C. C. 593;

Intrastate Rates within Illinois (Chicago, Lake Shore & South Bend Rwy. Co.) (1923), 77 I. C. C. 173.

In the Supreme Court of the United States.

OCTOBER TERM, 1923. No. 228.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,

vs.

THE VILLAGE OF HUBBARD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

SUPPLEMENTAL BRIEF FOR THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY UPON RE-ARGUMENT.

I. FOREWORD.

This case and the *Wellsville Case* (No. 229, October Term, 1923) were argued together before this Court on 22 April, 1924. On 9 June, 1924, this Court, on its own motion, restored both cases on the docket for re-argument.

II. SUPPLEMENTAL ARGUMENT.

The facts in this case are not in dispute. This Appellant Carrier is distinctly not a street railway; it is an *interurban electric railroad* (see original brief pages 3-4). The question before this Court is the jurisdiction of the Interstate Commerce Commission over electric railroads.

1. The Fundamental Error of the Statutory Court.

As we pointed out in our original brief (pages 11-43) the fundamental error of the Statutory Court was its construction of Section 1 of the Interstate Commerce Act. That Section always provided that the *entire* Act applied to every common carrier "engaged in the transportation of passengers **OR** freight wholly by railroad" in interstate commerce.

The Statutory Court, however, construed that language to require the transportation to be *both*

"of passengers **AND** freight." There is nothing in the entire code of Federal regulatory legislation which justifies such a construction. The adoption of such a construction would be disastrous. One of numerous illustrations is sufficient.

The Hudson River Tube System (Hudson & Manhattan Railroad Company) transports by electric railroad many millions of *passengers* between New York and northern New Jersey points. *It does not transport one ounce of freight, express or mail.* Under the theory of the Statutory Court that carrier would not be subject to the jurisdiction of the Commission, although it has been for many years. *Local Fares of the Hudson & Manhattan Railroad Company* (1920), 58 I. C. C. 270. If that carrier is not under the jurisdiction of the Interstate Commerce Commission, it is not under the jurisdiction of any regulatory commission for any practical purpose because practically all its transportation service is strictly interstate commerce. Is a construction which would produce such a result the construction this Court should adopt?

In the case at bar the affirmance of the Statutory Court's decree would exempt from all regulation all the *interstate* service of Appellant Carrier. Is a construction sound which would leave

unregulated all the *interstate* service of this Carrier?

We earnestly contend that the transportation of freight by Carrier was not a *sine qua non* to the jurisdiction of the Commission. Even if Carrier did not transport one ounce of freight (it did transport 922 carloads and 12,714 tons of less-than-carload freight in 1919 and 1920), nevertheless it was a common carrier by railroad subject to the Act. We fail to perceive why the transportation of *property* should be so dignified above the transportation of *passengers*. The Act makes no such distinction, but places both on the same level. As was said by Judge Wolverton in *Pacific Spruce Corporation* vs. *McCoy, et al.* (Dist. Ct. Oregon, 1923), 294 Fed. 711, 714:—

> It is not essential for constituting the utility a common carrier that it carry *both* passengers *and* freight, or that it carry all kinds of freight.*

This Court in the *Tap Line Cases* (1914), 234 U. S. 1, 58 L. ed. 1185, held carriers to be common carriers by railroad subject to the Act and under the jurisdiction of the Commission when they did not carry a *single passenger.*

* Italics in all quotations are inserted by us unless otherwise designated.

The only basis upon which the construction of the Statutory Court can rest is: *Steam* carriers are subject to the Act if they transport *either* passengers *or* property. *Electric* carriers are subject to the Act if they transport *both* passengers *and* property.†

The weakness of this basis is that the Congress has made no such distinction in the *motive power* by which to test the application of the Act to an interstate carrier. As was said by Mr. Commissioner Harlan in *Chicago & Milwaukee Electric Railroad Company* vs. *Illinois Central Railroad Company et al.* (1907), 13 I. C. C. 20, 26:—

> It is scarcely necessary to add that the apprehension of counsel that the merits of complainant's contention may be prejudiced or obscured by the fact that it is an electric line is without foundation. *The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to make such distinction. Both are subject to the act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us.* Moreover, progress in the science of electricity and the rapid increase of new devices for its application have led many practical railroad men to think that we may be measurably near its general

† And too, the property transported must be of all classes and kinds, and produce a revenue in excess of 5% of the gross revenue (R. 42).

use as the chief motive power in transportation.‡

That such a basis would be clearly unsound was recognized by this Court in *Omaha & Council Bluffs Street Railway Company* vs. *Interstate Commerce Commission* (1913), 230 U. S. 324, 337, 57 L. ed. 1501.

There is no distinction between steam and electric railroads either in law or in fact. In *Booth: Street Railways* (2nd Ed., 1911), page 696, it is said of these electric railroads:—

> In the country, however, the modern lines are constructed to a large extent upon private rights of way, upon road beds similar in construction to steam railroads, with the "T" rail, and, in some cases, upon graded and rock ballasted roads; the cars run at a high rate of speed, stop only at designated stations, and usually are larger and heavier than ordinary street cars. *In fact, they are becoming more and more like commercial railroads.* Many of them carry mail, express and light freight; some of them carry heavy freight, a few of them operate special freight trains, while on some of the western lines sleeping cars have been added to the limited trains.

‡ That in the near future most carriers by railroad will be operated by electric motive power cannot be doubted. See the comprehensive report on this matter submitted to the Secretary of Interior in 1921, *A Super Power System for the Region Between Boston and Washington* (United States Geological Survey, Professional Paper 123), pages 50-83.

With the exception of the statement concerning sleeping cars, the above quotation accurately describes the road and operation of Carrier in the case at bar. (See original brief, pages 3-4.)

We earnestly submit that the Statutory Court committed a fundamental error in construing Section 1 of the Act so as to require the transportation of *both* passengers **AND** property by an electric carrier as the test of being subject to the Act.

2. The Subsidiary Errors of the Statutory Court.

The Statutory Court, having committed this fundamental error, endeavored to bolster up its position by various methods and in so doing committed other errors.

First.—The Statutory Court sought to avoid the effect of the decisions of this Court in the Liability and Safety Appliance Cases (see original brief, pages 18-24), in which similar electric railroads were held to be "common carriers by railroad." This Court, however, has made no such distinction. In construing the phrase "common carrier by railroad" of the Interstate Commerce Act itself in the recent case of *United States ex rel.* vs. *Interstate Commerce Commission,* No. 288, October Term, 1923, decided 26 May, 1924, 68 L.

ed. , this Court cited with approval a prior decision under the Employers' Liability Act (*Wells Fargo & Company* vs. *Taylor,* 254 U. S. 175, 65 L. ed. 205), which had defined a "common carrier by railroad" as,

> One who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.

This definition did not rest upon the words of any particular act, but was "in accord with the ordinary acceptance of the words." We can not conceive how this Carrier fails to meet that definition.

There is nothing either in the Liability and Safety Appliance Acts or the decisions of this Court construing them to justify the distinction made by the Statutory Court, that an electric railroad is a "common carrier by railroad" within the meaning of that phrase in those two acts, but not within the meaning of that phrase in the Interstate Commerce Act.

Second.—The Statutory Court sought to belittle Carrier's freight transportation service, saying (R. 32):—

> *Plaintiff asserts* that demurrage on cars received from the New York Central Railroad begins to run from the time the cars are delivered to the defendant's line.

Passing the question that the Commission did not so find and that this case was submitted on the Report and Order of the Commission (R. 43-44), nevertheless it is of no importance in the determination of this case. In *Upper Merion & Plymouth Railroad Company* vs. *Pennsylvania Railroad Company* (1923), 81 I. C. C. 191, the Commission held the complainant to be a common carrier by railroad although it issued no bills of lading for through traffic and *demurrage was handled directly between the shippers and the trunk line carriers.* Such minor incidents in the transportation service are not material, *Hood Coal Company* vs. *Monongahela Valley Traction Company* (1922), 73 I. C. C. 54, where an electric interurban railroad was held to be subject to the Act.

The Statutory Court brushed aside the express findings of the Commission (R. 18) that in 1919-20 Carrier transported over its lines 922 carloads of freight and 12,714 tons of less-than-carload freight and that it has through freight rates with other electric railroads, by stating (R. 42):—

> In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent. of the gross earnings of the defendant company. Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.

As we have consistently maintained, it was not necessary for Carrier to have transported one ounce of freight to be under the jurisdiction of the Commission (*supra*, pages 2-7). However, Carrier not only held itself out to transport, but actually did transport, freight for the public generally and the Commission expressly so found. In the *Tap Line Cases, supra*, this Court found that one of the carriers transported *no passengers*, and that the passenger receipts of another of the carriers were only $473.77 out of a total operating revenue of $220,985.94 or about 1/5 of 1 per cent. This Court was not concerned with such minor facts, because, as it pointed out (page 24):—

> the *extent* to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the *right of the public* to use the road's facilities and to demand service of it, rather than the *extent* of its business, which is the real criterion determinative of its character.

In the case at bar, the Commission has found that the public may use and has generally used Carrier's freight transportation service, both directly and by joint service with trunk line steam carriers, which are unquestionably subject to the Act. This finding covers the important and outstanding fact. It is immaterial that, during the

two years involved, the public made no greater use of this service. The Commission found all the facts which show that Carrier is engaged generally in both the passenger and freight transportation service. The findings are conclusive.

Third.—The Statutory Court combed the Interstate Commerce Act and the Transportation Act, 1920, for all instances where the Congress, for one reason or another, expressly excluded interurban electric railroads from the operation of *specific* sections and parts of sections of the acts (R. 36-38). It added up all these express exclusions, and concluded that since the Congress saw fit to exclude interurban electric railroads by *express* language from *certain* portions of the Act, *ergo,* it intended to exclude them by *implication* from the *entire* Act. It entirely overlooked the fact that the Congress made no such exclusions in Sections 1, 2 and 3 of the Act (the only Sections involved in these proceedings). The fact that the Congress deemed it necessary to exclude interurban electric railroads by express language from certain portions of the Act, is conclusive that the Congress considered interurban electric railroads to be "common carriers by railroad" subject to the *other portions of the Act* and under the jurisdiction of the Commission. If interurban electric railroads were not "common carriers by railroad"

within the meaning of Section 1 of the Act, they could not possibly be "common carriers" within the meaning of those Sections and parts of Sections from which the Congress expressly excluded them. The only rational conclusion which can be drawn from the action of the Congress in the Transportation Act, 1920, is that it adopted the long and uniform administrative interpretation of the Commission and intended these interurban electric railroads to be "common carriers by railroad" subject to the Act and under the jurisdiction of the Commission.

The Statutory Court gave no weight to the long and uniform construction placed upon the Act by the Commission and the adoption of that uniform construction by the Congress in 1920. (See original brief, pages 47-51.) As an appendix to our original brief we filed a partial list of cases decided by the Commission holding or treating electric railroads within its jurisdiction. As an appendix to this brief we file an analysis of those cases according to subject matter, from which the Court will readily perceive the broad interests affected and the chaotic condition which would arise by a reversal of the position long adhered by the Commission and acquiesced in by the Congress.

III. CONCLUSION.

If the Congress had not intended these interstate electric railroads to be subject to the Act and under the jurisdiction of the Commission, then this Court should so hold, nothwithstanding the disturbance of this important branch of interstate commerce transportation service which will arise from such a ruling. But this Court can reach such a conclusion only by disregarding the fact that the two other coordinate branches of the Government have consistently interpreted the Act to include these electric carriers. The Commission has consistently so interpreted the Act from 1897. The Congress, knowing of this long and uniform administrative interpretation, adopted it in the Transportation Act, 1920, by reenacting without change the original definition of "carriers" in Section 1; and by expressly excluding such electric carriers from specific Sections and parts of Sections *which would otherwise have applied to them.*

We earnestly submit, therefore, that this Court should reverse the Statutory Court with directions to dismiss the bill, and construe the Act so as to produce no incongruous results.

Respectfully submitted,

DOUGLASS D. STOREY,
U. C. DEFORD,

Solicitors.

APPENDIX.

ANALYSIS ACCORDING TO SUBJECT MATTER OF THE PARTIAL LIST OF CASES DECIDED BY THE INTERSTATE COMMERCE COMMISSION HOLDING OR TREATING INTERURBAN ELECTRIC RAILROADS WITHIN ITS JURISDICTION (SEE ORIGINAL BRIEF, PAGES 56-61).

I. Regulation of Just and Reasonable Rates.

1. COMPLAINT SUSTAINED—RATES REDUCED.

Beal vs. *Washington, Alexandria & Mt. Vernon Rwy.* (1911) 20 I. C. C. 406;

Citizens of Somerset vs. *Washington Railway & Elec. Co.* (1912) 22 I. C. C. 187;

Bitzer vs. *Washington-Virginia Rwy. Co.* (1912) 24 I. C. C. 255;

Steubenville vs. *Tristate Rwy. & Elec. Co.* (1916) 38 I. C. C. 281;

Louri Mfg. Co. vs. *Cincinnati Northern R. R. et al.* (1916) 42 I. C. C. 448;

Gasoline from Coffeyville, Kansas (1917) 43 I. C. C. 98;

Newspapers on Passenger Cars (1920) 57 I. C. C. 743;

Local & Joint Passenger Rates (1920) 59 I. C. C. 430;

New Albany vs. *Louisville & Northern Rwy. & L. Co.* (1921) 64 I. C. C. 468;

Buckeye Pipe Line Co. vs. *B. & O. R. R. et al.* (1922) 73 I. C. C. 19.

2. Complaint Dismissed—Rates Sustained.

Silvester vs. *City & Suburban Rwy. Co.* (1912) 22 I. C. C. 201;

St. Louis, Mo.—Illinois Passenger Fares (1916) 41 I. C. C. 584;

East Liverpool vs. *Steubenville, etc. & Beaver Valley T. Co.* (1918) 51 I. C. C. 563;

Badger Lumber Co. vs. *Kansas City Rwy. Co. et al.* (1920) 58 I. C. C. 97 (freight). See also 60 I. C. C. 278;

Local Fares of Hudson & Manhattan R. R. (1920) 58 I. C. C. 270;

Joint Passenger Fares (1920) 59 I. C. C. 170;

Class & Commodity Rates on Kansas City Rwy. Co. (1920) 59 I. C. C. 382;

Greater Belleville B. T. vs. *East St. Louis & Surburban Rwy. Co.* (1921) 60 I. C. C. 741;

Commuters Club vs. *W. B. & Annapolis Electric R. R.* (1921) 61 I. C. C. 302;

Fares of Washington-Va. Rwy. Co. (1921) 62 I. C. C. 200;

Providence Fruit & Produce Co. vs. *Rhode Island Co.* (1922) 69 I. C. C. 422;

Hood Coal Co. vs. *Monongahela Valley T. Co.* (1922) 73 I. C. C. 54.

II. Unjust Discrimination and Undue Prejudice.

1. COMPLAINT SUSTAINED.

Ford vs. *Washington-Va. Rwy. Co.* (1912) 24 I. C. C. 632;

Hurst vs. *Boise Valley Traction Co.* (1918) 51 I. C. C. 697;

Beall vs. *Wheeling Traction Company* (1921) 60 I. C. C. 600.

2. COMPLAINT DISMISSED.

Willson vs. *Rock Creek Rwy. Co.* (1897) 7 I. C. C. 83.

III. Reparation.

1. GRANTED.

United Iron Works vs. *Director General, et al.* (1920) 59 I. C. C. 312;

Buckeye Pipe Line Co. vs. *B. & O. R. R., et al.* (1922) 73 I. C. C. 19.

2. DENIED.

Badger Lumber Co. vs. *Kansas City Rwy. Co.* (1920) 58 I. C. C. 97;

Electric Coal Co. vs. *Director General, et al.* (1921) 60 I. C. C. 683;

Gillespie Coal Co. vs. *Illinois Traction System* (1921) 62 I. C. C. 335.

IV. 15th Section Application—Increased Rates.

Louisville Passenger Fares (1919) 52 I. C. C. 366 (passenger);

Badger Lumber Co. vs. *Kansas City Rwy. Co.* (1920) 58 I. C. C. 97 (freight).

V. 15 A Section Application—Increased Rates.

Ex parte 74 (1920) 58 I. C. C. 220, 253.

VI. 13 (3) Section Application—Removal of Discrimination and Prejudice to Interstate Commerce.

APPLICATIONS GRANTED.

South Carolina Fares & Charges (1921) 60 I. C. C. 290, 294;

Intrastate Fares of Chicago, North Shore & Milwaukee R. R. (1921) 62 I. C. C. 188;

Kansas Rates, Fares & Charges (1921) 62 I. C. C. 440;

Ohio Rates, Fares & Charges (The P-O P. & L. Co.) (1921) 64 I. C. C. 493;

Ohio Rates, Fares & Charges (S. E. L. & B. V. T. Co.) (1921) 64 I. C. C. 517;

Intrastate Rates within Illinois (1922) 66 I. C. C. 350;

Indiana Passenger Fares & Charges (1922) 69 I. C. C. 180;

Intrastate Rates in Illinois (1923) 77 I. C. C. 173.

VII. Filing Reports of Finances, Operations and Accidents.

Jurisdiction over Urban Electric Lines (1915) 33 I. C. C. 536.

VIII. Regulation of Tariff Rules.

Knapp Supply Company vs. *Ohio Electric Rwy. Co.* (1916) 38 I. C. C. 627. (Tariff rule governing shipment of pipe found unreasonable.)

IX. Through Routes and Joint Rates.

1. ESTABLISHMENT OF.

A. *Granted.*

Cedar Rapids & Iowa City Rwy. & L. Co. vs. *Chicago & Northwestern R. R.* (1908) 13 I. C. C. 250;

Cincinnati & Columbus T. Co. vs. *B. & O. S. W. R. R.* (1911) 20 I. C. C. 486 (reversed by Supreme Court);

St. Louis etc. Co. et al. vs. *Peoria & Pekin Union Rwy. Co.* (1913) 26 I. C. C. 226;

Louisville Board of Trade vs. *Indianapolis etc. Traction Co.* (1913) 27 I. C. C. 499;

St. Louis Electric Terminal Co. vs. *C. C. & St. Rwy. Co.* (1919) 55 I. C. C. 52;

Chicago, L. S. & S. B. Rwy. Co. vs. *Director General et al.* (1920) 58 I. C. C. 647;

Michigan Railroad Co. vs. *Pere Marquette et al.* (1922) 74 I. C. C. 496.

B. *Refused on Grounds of no Necessity.*

Chicago & Milwaukee R. R. vs. *Illinois Central* (1907) 13 I. C. C. 20;

Chicago etc. Rwy Co. vs. *Chicago & N. W. R. R.* (1915) 33 I. C. C. 573;

Michigan Rwy. Co. vs. *Michigan Central R. R.* (1918) 49 I. C. C. 255;

Chicago, L. S. & S. B. Rwy. Co. vs. *Director General* (1920) 58 I. C. C. 135;

Farmers Square Deal Grain Co. vs. *Fox & Illinois Union Rwy. Co. et al.* (1922) 74 I. C. C. 593.

2. Cancellation of Refused.

Cancellation of Joint Class Rates (1920) 59 I. C. C. 122;

Cancellation of Joint Through Rates (1920) 59 I. C. C. 404;

Cement to W. B. & A. Electric R. R. Stations (1921) 63 I. C. C. 264;

Cancellation of Joint Class Rates (1922) 66 I. C. C. 449.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

CITY OF WHEELING, OHIO,

Appellee.

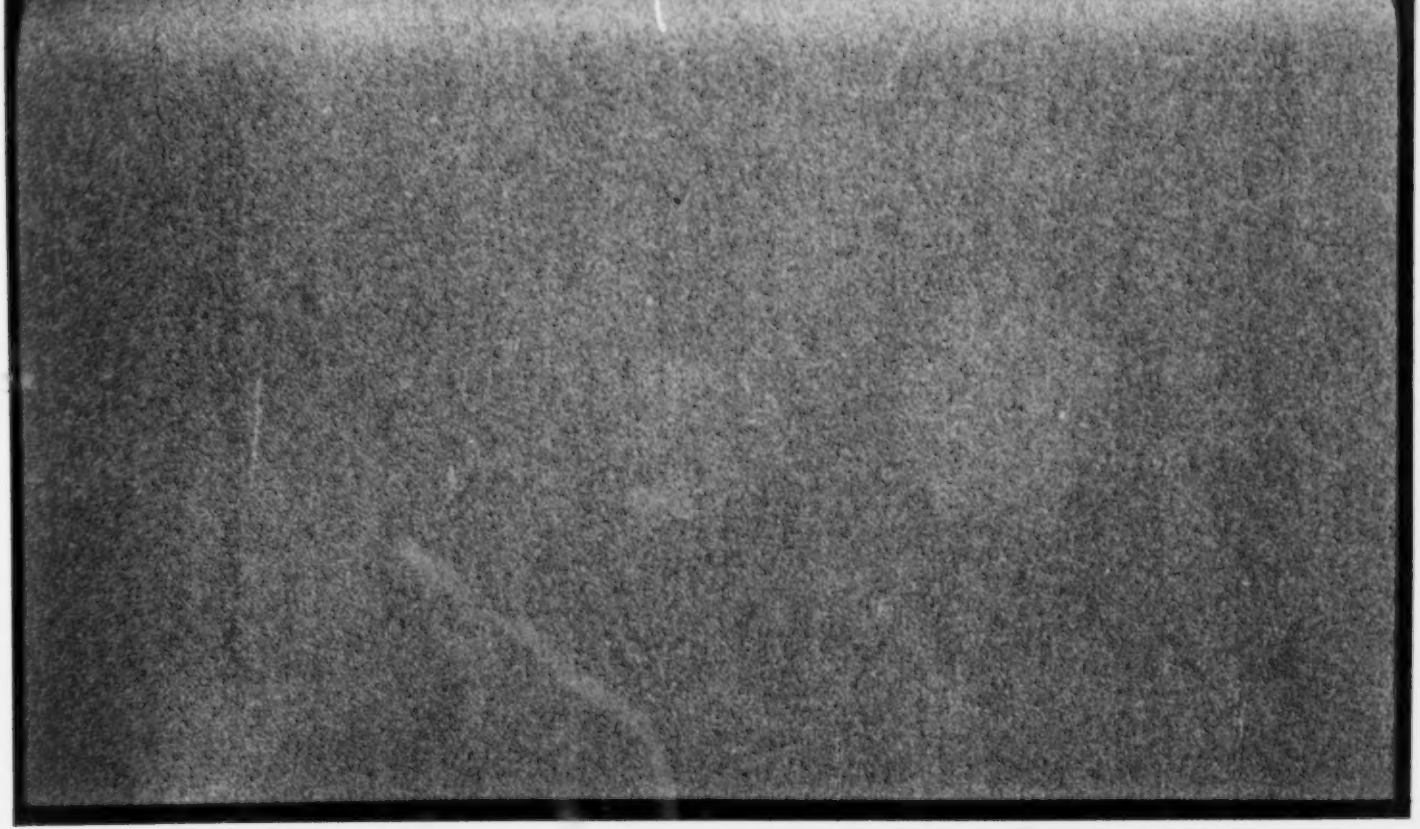
BRIEF FOR APPELLANT, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY.

ANDREW HUSS,

T. H. HOOKER,

Solicitors for Appellant,

The Steubenville, East Liverpool & Beaver Valley Traction Company.



No. 229.

In the Supreme Court of the United States

October Term, 1923.

The United States of America, The Steubenville, East Liverpool & Beaver Valley Traction Company, and Interstate Commerce Commission,

Appellants,

vs.

City of Wellsville, Ohio,

Appellee.

BRIEF FOR APPELLANT, THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY.

STATEMENT OF THE CASE.

The Steubenville, East Liverpool & Beaver Valley Traction Company, defendant below, is an electric interurban railway operating over a distance of some forty miles in eastern Ohio and western Pennsylvania. It operated in and through certain municipalities—including the appellee, the City of Wellsville, under franchises which fixed the rates that should be charged for passenger transportation. The result being that this appellant was unable to increase its intrastate passenger fares to the level charged for interstate traffic. Upon investigation in a proceeding instituted by the Interstate Commerce Commission upon petition filed, the Commission, after hearing, found that the interstate rates and fares

of this appellant as contained in its tariff on file with said Commission were just and reasonable and that the lower intrastate rates had the effect of practically denying to the company the use of its interstate fares. (For report of the Commission see Record pages 7 to 15 inclusive.) Thereupon the Commission made and issued its order

> "that the Steubenville and East Liverpool and Beaver Valley Traction Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the State of Ohio found in said report to be just and reasonable for the future."

Whereupon the City of Wellsville, Ohio through which this appellant operated its railway, filed its complaint in the United States District Court for the Northern District of Ohio, Eastern Division, praying that appellants be enjoined from enforcing such order so made by the Interstate Commerce Commission. Upon the issues made in said suit hearing was had before Hon. Maurice H. Donahue, Circuit Judge, Hon. John M. Killits and Hon. D. C. Westenhaver, District Judges, first upon an application for temporary injunction which was granted and afterwards submitted under a "stipulation for record for final hearing" (Record p. 67). Whereupon final decree was entered permanently enjoining and restraining appellants from putting into effect said order of Interstate Commerce Commission, to which each appellant objected and excepted. To review this decision the cause was brought into this Court by appeal from said final decree so entered by the District Court.

The District Court upon the pleadings, findings and order set forth on page 67 of the Record, found that the appellant is not a "railroad" within the meaning of Section 1 of the Act to regulate commerce, on the grounds (I) That the case of *Omaha and Council Bluffs Street Railway Co. vs. The Interstate Commerce Commission,* 230 U. S. 324 and the various amendments to the Act to regulate commerce indicate that such section applies, so far as interurbans are concerned, only to those engaged in the general transportation of freight or operated as a part of a general steam system of transportation and (II) that this appellant is not engaged in the general transportation of freight (it being admitted that it is not a part of a general system). These bases will be taken up in inverse order.

I.

We agree with the District Court (page 36) that "The Interstate Commerce Commission's findings of facts * * * are conclusive upon this Court if supported by substantial evidence." The Interstate Commerce Commission found as a matter of fact (page 8) that

> "A *daily freight service* is maintained between Steubenville, Ohio, and Midland, Pennsylvania, and a *through car runs from Steubenville to Beaver, Pennsylvania,* * * * as often as the traffic demands, which at the time of hearing was about once a week.
>
> "At Vanport the Traction Company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh and Lake Erie Railroad at Beaver." (Italics ours)

There can be no disagreement concerning the "substantial evidence" which supports these findings. The

District Court does not say that the evidence before the Commission was insufficient to support the assertion that the appellants maintain a daily interstate freight service. It held however, that such a daily freight service was not engaging "in the general business of transporting freight" because (a) the freight was usually in less than carload lots and (b) it amounted to a small percentage of the gross earnings of the Company.

We submit that in determining whether or not a Company is engaged in the general business of transporting freight, the criterion should be *regularity of service* rather than the volume of freight carried. If the District Court's criterion be correct, where shall the line be drawn? We do not believe that Congress ever intended such a distinction to be made. If it had, it certainly would have indicated, in a general way at least, the percentage of freight income necessary to class a carrier as a railroad. On the other hand, our view seems to be supported by the literal meaning of the terms "general transportation of freight." *The word "general" has no connection with volume.* On the contrary, the connotation is this: that the carrier is generally prepared, i. e. prepared at all times—to accept and transport freight in general—i. e. freight of all kinds. This the appellant was prepared to do. It held itself out as a general carrier of freight; it maintained a *daily* freight service.

In *United States vs. B. & O. Southwestern Ry. Co.*, 226 U. S. 14, the appellant was "an interurban electric railway for passengers and *some* freight." This case will be adverted to later and it is enough to say here that if the District Court's criterion be correct, this Court in that case should have examined into the *percentage of freight* carried by the appellant. It does not appear that it did so.

II.

Assume however, that the appellant is not engaged in the general transportation of freight. The lower court decided that it is not a "railroad" within the meaning of Section 1 of the Act and based this conclusion on the following grounds:

(a) The *Omaha* Case. (*supra*)

(b) The amendments of 1910 and 1920 to the Act to Regulate Commerce which—in respect to Sections 1 (Paragraphs 18 to 22), 15, 15a and 20a—expressly exempt certain interurbans from the jurisdiction of the Interstate Commerce Commission.

(c) The general plan of government regulation of carriers.

(a) The Omaha Case.

The appellant in the *Omaha* Case (230 U. S. 324) was strictly a street railway; it was confined to the boundaries of a single municipal community (artificially divided by a state line); it carried no freight whatever; its tracks were laid in the public streets; its stations were the street corners; its field of activity was to "aid *street* traffic * * * for the use of a single community."

In the instant case on the other hand, the Commission found as a fact that

> "Whatever may have been the original service afforded by the respective railways at the time of their merger, the Traction Company is now carrying on *much more* than a street railway business. In its interurban operations it now assumes the status of an electric railway and as such is engaged in interstate transportation." (Italics ours)

The facts in the *Omaha* case (as noted by Mr. Justice Lamar) are fundamentally different from the case now before the Court where we have

> "* * * a new type of interurban railroad * * * with electricity as a motive power, using larger cars and running through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. *We are not dealing with such a case* * * *." (Page 337, Italics ours)

(b) Amendments to the Act to Regulate Commerce.

After the passage of the original Act in 1887 the Interstate Commerce Commission assumed jurisdiction over electric railways including those whose sole business was the transportation of passengers and incidentally express (7 I. C. C. 83—13 I. C. C. 20—20 I. C. C. 406—20 I. C. C. 486). This assumption of control was apparently unchallenged for it was said in the *Omaha* Case in 1912 by the Government Counsel arguendo "* * * there are now in the public records of the Commission between 3,000 and 4,000 electric railway tariffs." (Page 332).

Can it be possible that Congress in enacting the amendments of 1910 and 1920 did not know that at that time the electric passenger railways were *in fact* subject to the powers of the Commission? And certainly after the question was noticed in the *Omaha* Case (where it was queried by way of a dictum whether or not the new type of interurban should come under the Act), after that case the legislators must have been familiar with the question. They must have known that after the *Omaha* Case, the Commission continued (as a matter of fact) to exercise jurisdiction over all electric interurbans engaged in interstate commerce.

In the face of these notorious facts what did Congress do in enacting the amendments of 1910 and 1920? If it had desired to indicate that independent passenger railways should not come within the jurisdiction of the Commission, it could very easily have said

> "Passenger interurbans not operated as a part of a general system of steam railroads shall be excepted from the provisions of *all parts* of this Act."

Instead of saying that Congress has in respect to four sections of the Act indicated that *these particular sections* shall not apply to such interurbans. *For each of these exceptions there is a reason* and the correct conclusion, we submit, is that Congress intended that the Commission should continue to exercise such jurisdiction as it was in fact then exercising under the original Act, but should not assume the additional powers conferred by certain portions of the amendments, to-wit: Section 1, Paragraphs 18 to 22, and Sections 15, 15a and 20a.

(i) Section 15, Paragraph 3.

In 1910 the powers of the Commission were enlarged to permit it thereafter whenever it deemed it advisable in the public interest, to establish through routes, classifications, rates, changes, etc. (Section 15, Paragraph 3). From the operation of this particular paragraph independent passenger railways were expressly exempted. Why? This amendment is concerned solely with *through* traffic; the words are: "* * * shall establish *through* routes, *joint* classifications and *joint* rates, fares or charges * * *." In view of the short extension and local character of the business of independent passenger interurban lines, the establishment of *through*

routes and rates would have very little practical application to them and it is not difficult to understand why Congress should desire not to impose upon an already overburdened Commission the additional task of establishing through routes and rates for the hundreds of interurbans then (in fact) under its jurisdiction.

(ii) Section 15a.

Similar considerations apply to Section 15a of the Act. This section (enacted 1920) provides for what is popularly called the government guarantee to railroads and with other statutes was enacted to untangle the complications incident to Federal control and to ward off the chaos that threatened to spring up when the railroads were returned to their owners. The government had controlled absolutely the property and finances of most of the roads and it was the intention of Congress to give these roads fair play and to furnish the weaker lines temporary support upon their return to their owners. Since independent passenger interurbans had never come under federal control, there was no need to include them under the provisions of this section and their exemption from these provisions is not sufficient basis for the innuendo read into it by the District Court.

(iii) Section 20a.

The same considerations apply to the exception set forth in Section 20a, a section enacted in 1920 which deals with railway securities and gives the Commission plenary powers over their issue. In the financial uncertainty following the termination of federal control, it was necessary that those roads affected thereby should be under government financial supervision, especially so when such roads

were operated under an arrangement whereby their earnings were to some extent guaranteed by the government and whereby they were required to contribute under certain circumstances to a reserve fund. In view of the purpose of this section, there is no mysterious and hidden meaning in the clause which exempts independent passenger interurbans from its operation. They received no government guarantee; they made no contributions to a reserve fund. There was, therefore, not the necessity for government supervision of their security issues; and to have given the Commission this additional jurisdiction would have placed upon its shoulders a heavy and useless burden which might have hindered it in accomplishing the main purpose of this section.

(iv) Section 1, Paragraph 22.

The fourth notice in the amended Act of independent passenger interurbans is found in Section 1, Paragraph 22 (enacted 1920) which provides:

> "The authority of the Commission conferred by Paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of * * * interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The reason for this is clear and underlies the discussions in the Senate debates on the merits of the bill (Cong. Rec. 66th Cong. S. B. 3381). Under the "reconstruction" plans of 1920 the government agreed to guarantee to some extent the earnings of those railroads which had been under federal control. It was quite essential that *such* roads should be supervised in respect to the construction and extension of new lines. Otherwise the strong roads—limited in the percentage of earnings

which they could retain—and the weaker roads—assured of extrinsic financial aid—might embark on unprofitable extension programs for ulterior motives and the whole system of guaranteeing earnings might suffer, indeed collapse. It was to remove this possibility that the amendment now known as Section 1, Paragraphs 18 to 21 inclusive was enacted.

The independent passenger interurban however, had not been under government control; *they received no guarantee of earnings* and it therefore was neither necessary nor within the purpose of the amendment to include them; hence Paragraph 22, Section 1.

(v) Transportation Act of 1920.

As the District Court observed the foregoing references constitute the sole mention of interurbans in the Act to regulate commerce and its amendments. In the Transportation Act of 1920 two similar references occur in Sections 209 and 300. The latter concerns the establishment of the Railroad Labor Board and the former, the establishment of guaranty provisions *for those lines which had been under government control.* Enough has been said in previous paragraphs to show that all this legislation of 1920 was for the purpose of covering the difficulties surrounding the transition of the federally controlled roads back to their owners. The Transportation Act is made expressly to apply to roads under federal control, and therefore its provisions were never meant to apply to those independent passenger interurbans under consideration in the present case.

In addition the terms themselves of Section 300 imply a conclusion contrary to that reached by the District Court. Paragraph 1 of that section provides:

> "The term 'carrier' includes any * * *carrier by railroad subject to the Interstate Commerce Act except * * * an interurban railway not operating as a part of a general steam railroad system of transportation."

This statement seems to imply that interurbans not operating as a part of a general steam railroad system are within the terms of the Act.

This Court in deciding an analogous question has held

> "Exceptions from the general policy which the law embodies are to be strictly construed and are to be so interpreted as not to destroy the remedial purpose intended."
>
> "The exception contained in S. 6 of the Safety Appliance Act of March 2, 1893 as amended * * * exempting from its operation cars which are used upon street railways does not exempt cars used in regular interstate traffic which are also to some extent used on street railways. Such cars are covered by the general provisions of the statute."
>
> *Spokane and Inland R. R. vs. United States*, 241 U. S. 344.

III.

The foregoing examination, we submit, shows that the District Court has rested its decision on untenable grounds. The *Omaha* Case (*supra*) is not in point; the exemption of independent passenger interurbans from certain amendments to the Act is in every case explained by the purpose of the enactment. In the light of the circumstances surrounding each amendment, the weakness of the contention that these specific references to independent passenger interurbans were

> "inserted out of an abundance of caution and to repel the implication that the word 'railroad' as used in Section 1 *did* include"

a carrier like the appellant (page 41) is apparent. Congress at the time of these amendments must have known that the Interstate Commerce Commission was *in fact* exercising jurisdiction over hundreds of independent passenger railroads. *And if the Act did not already apply to independent passenger interurbans, there was no need to exempt them specifically from the provisions of these amendments.* If Congress were so imbued with caution, as the lower court suggests; if it really intended that the Commission should not control these lines, why did it not adopt the simple and obvious method and say, "independent passenger railways shall not be subject to *any* of the provisions of this Act." Instead it has specified a *few instances*—every one of which is based on reasons not noted by the District Court—in which the Act shall not apply to them. This indicates clearly, we believe, that, in the mind of Congress, the Act as a whole covers and controls the appellant and lines of its class.

Apparently this same view was held by this Court in deciding the case of *United States vs. B. & O. Southwestern Ry.*, 226 U. S. 14. There the appellant was running an "interurban * * * for passengers and *some* freight" in intrastate transportation; appellees were parallel steam roads with which the appellant sought switching connections under the provision of Section 1, Paragraph 9 of the Act to Regulate Commerce which provides that connections shall be made upon the application of any *lateral branch line of railroad.* The decision was against the appellant because it was not a *branch* line. In other words, it was assumed both by the court and by counsel that the appellant was a *railroad* in the meaning of Section 1 of the Act. If it was a "railroad," then it clearly came within Section 1a which reads:

> "The provisions of this Act shall apply to common carriers engaged in the transportation of passengers for profit wholly by railroad * * *."

True the proportionate amount of freight carried by the Cincinnati and Columbus Traction Company does not appear from the report, but it seems fair to assume (since it is the same sort of a line as the appellant is) that its freight business bore a similar ratio to its passenger traffic.

In addition, as noted by the District Court (record 45), this Court has held that under the Employers Liability Act and the Safety Appliance Act the term "railroad" includes independent passenger interurbans. The lower court explains this by saying that these two statutes are remedial and should be liberally construed. We submit that this difference should not be extended so as to make "railroad" mean one thing in one Act and another thing in another Act. The function of the courts in interpreting all three Acts is to give effect to the expressed intention of Congress. What basis is there for holding that Congress did not use the term "railroad" in the same sense in all three Acts?

Again the District Court assumes that the original Act was passed for the sole purpose of combating the evil of "pooling, rebating and discrimination" (page 45). We believe however, that the Act with its amendments has a far wider purpose: the complete control of interstate commerce carried by railroads in order that the people of one state may have reasonable access by railroad to another state without the burden of local control. This view is supported by the strong language of Section 13 of the Act (passed 1910 and re-enacted 1920), Paragraph 4 of which provides:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Does Congress intend that the people of Pennsylvania in pursuing their right to travel and send goods over appellant's line into Ohio shall be thwarted by a local ordinance of the Village of Wellsville? Is interstate commerce any less the concern of Congress because it is moved by electricity instead of steam? The answer lies in the quotation just given which indicates that the intention of Congress is to give the federal authorities the fullest control over interstate commerce.

IV.

We submit therefore, that the District Court erred in its decision holding that the appellant is not subject to the jurisdiction of the Interstate Commerce Commission because (1) it is engaged in the general transporta-

tion of freight and (2) even if not so engaged the language of the Act and the specific exceptions in Sections 1, 15, 15a and 20a together with Section 13 show that Congress intended the Commission to have jurisdiction.

This conclusion is supported by decisions of this Court in the case of *United States vs. B. & O. Southwestern Ry.*, 226 U. S. 14; in the case of *Spokane & Inland Railroad Co. vs. United States*, 241 U. S. 344, and in cases noted in the opinion of the District Court (Rec. 45) involving the Safety Appliance Act and Federal Liability Act (See *Kansas City vs. McDow*, 240 U. S. 51; *Spokane and Inland R. R. Co. vs. Campbell*, 241 U. S. 497.

Respectfully submitted,

AGNEW HICE,

T. H. HOGSETT,

Solicitors for Appellant,

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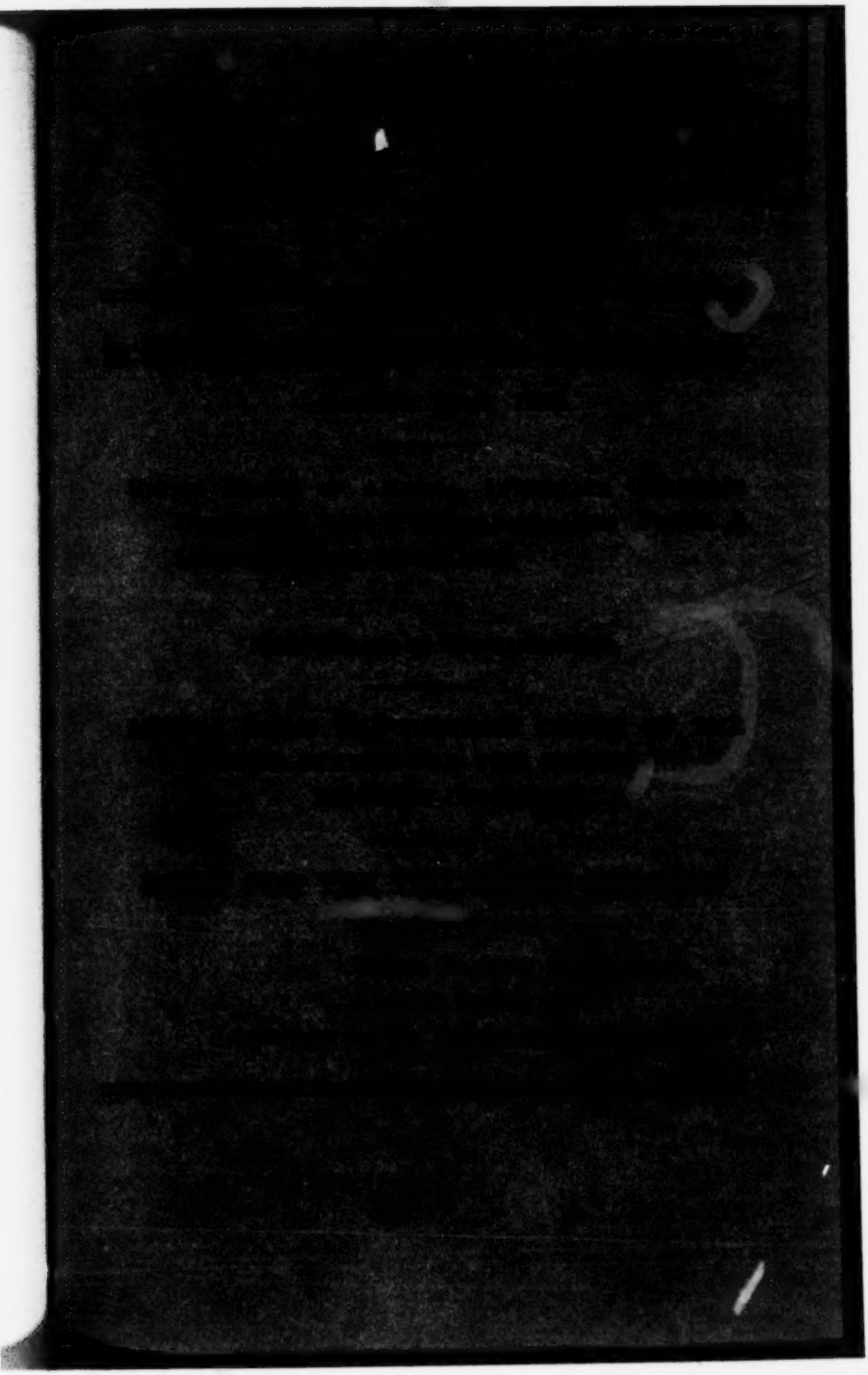

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In the Supreme Court of the United States

OCTOBER TERM, 1923

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, APPELLANTS,
v.
THE VILLAGE OF HUBBARD, OHIO. } No. 228.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE VILLAGE OF HUBBARD

HISTORY AND STATEMENT

The Village of Hubbard is located in Trumbull County, Ohio, about mid-way between Sharon, Pennsylvania, and Youngstown, Ohio; Youngstown being 8.75 miles westwardly from the east limits of Hubbard, and Sharon, 7.18 miles eastwardly from the west limits of Hubbard.

In 1901, a franchise ordinance was passed by the Village of Hubbard, and accepted by The Youngstown & Sharon Railway Company, which provides for the

maintenance between Hubbard and Youngstown of a cash fare of 12 cents, and between Hubbard and Sharon, a cash fare of 13 cents. Between Hubbard and both cities the franchise requires the sale of round-trip tickets at the rate of 20 cents for a single ticket, special tickets, good for 22 rides, for $2.00, and 54 commutation tickets for $3.80. This franchise expires on January 1st, 1925.

In 1917, the Grantee was merged with several other corporations, under the name of the Mahoning & Shenango Railway & Light Company. This name was, in 1920, changed to Pennsylvania-Ohio Electric Company. On November 21st, 1920, a new corporation, the Pennsylvania-Ohio Power and Light Company, one of the appellants, was organized to take over and operate the Youngstown and Sharon line.

The line thus acquired by such appellant, and now operated by it, is located wholly within the State of Ohio, and extends from Youngstown, Ohio, to the Ohio-Pennsylvania State Line. By traffic arrangement with the Shenango Valley Traction Company, it operates its cars from the State Line, a distance of about one mile, over the tracks of the Shenango Valley Traction Company. For a distance of nearly a mile and a half within the Village of Hubbard, the street railway operates over the streets of that village, and a considerable portion of its tracks outside of the village is laid on the public highways.

Effective February 15th, 1920, such Mahoning & Shenango Railway & Light Company, then the owner and operator of such appellant's line, by a tariff filed with the Interstate Commerce Commission, increased,

in defiance of its said franchise contract, its one way fare between Hubbard and Sharon to 20 cents, the price of a 54 trip commutation ticket to $5.00, and cancelled the round-trip and special tickets between such points.

Having thus violated its contract, the Pennsylvania-Ohio Electric Company, successor to the Mahoning & Shenango Railway & Light Company, filed with the Interstate Commerce Commission a petition, alleging the discrimination which it, itself, had thus created, and praying for an order:

> "Forbidding all preferences and discriminations by requiring the establishment by the petitioner of *intrastate rates,* fares and charges, within the State of Ohio for the *intrastate transportation* of passengers, that will remove such advantage, preference, prejudice or discrimination, the said ordinance of the Village of Hubbard, the laws of the State of Ohio, or the decision or order of the said Public Utilities Commission of Ohio to the contrary notwithstanding." (Italics ours.)

The Interstate Commerce Commission did not see fit to remove the alleged discrimination by directing the petitioner to restore the rates provided for under its contract, but, on the 7th day of November, A. D. 1921, ordered:

> "That the Pennsylvania-Ohio Power & Light Company be, and it is hereby notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger

> fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents, when paid in cash, and $5.00 for 54 rides, when a commutation ticket for this transportation is purchased."

Prior to filing its petition, requesting the Interstate Commerce Commission to order it to violate all *its* contract obligations to the Village of Hubbard, while retaining all the privileges granted by the Village to it, the Mahoning & Shenango Railway & Light Company, the predecessor of the appellant, had made application to the Public Utilities Commission of Ohio for permission to increase its rates, which permission had been denied by the Public Utilities Commission; whose action, upon error, was affirmed by the Supreme Court of Ohio. *Mahoning & Shenango Ry. & Lt. Co. v. The Public Utilities Commission,* 98 O. S. 303.

The Village of Hubbard filed a bill in equity against the appellants in the District Court of the United States, for the Northern District of Ohio, to restrain the putting into effect of the rates provided for in such order of the Interstate Commerce Commission. Upon hearing before the statutory court, in such case made and provided, a permanent injunction was granted as prayed for.

In the Commission's report, it is said:

> "Petitioner is also engaged in the transportation of freight as will be later explained."

Later in the report, the facts in this regard are stated. The Street Railway has two connections, one direct at Masury and the other over a private siding at

Stop 41 (both between Hubbard, Ohio, and the Ohio-Pennsylvania State Line) with the New York Central Railroad. *It does not originate and deliver freight traffic over the New York Central Railroad,* but, in the two years—1919 and 1920—922 cars of freight were *received* by it from that line for delivery chiefly at points on such appellant's line. Such appellant also operates a daily less-than-carload freight and parcel package service between Youngstown and Sharon, and three days each week operates a through car for such service from Sharon, in Pennsylvania, to New Castle, Pennsylvania. This through car, it will be noted, is loaded and unloaded wholly outside of the State of Ohio, and for the greater portion of the distance, is operated wholly outside of the State of Ohio and over a Street Railway line, not owned by such appellant.

In 1919, the less-than-carload freight amounted to 6,240 tons, which produced a revenue of $18,000.00, and the carload and switching revenue was $6,246.52. In 1920, the less-than-carload freight was 5,474 tons and produced a revenue of $21,221.00. The carload and switching traffic yielded $5,259.00. The passenger revenue receipts for 1920 were $332,173.43.

Thus, it will be seen that the total amount of revenue received from all kinds of freight and express service, as well as switching charges, was about seven per cent. of the total revenues of the Street Railway. The gross revenue derived from switching cars from the New York Central was one and one-half per cent. of the total gross revenues.

It is to be borne in mind also, that no outgoing freight over the New York Central originates with such

appellant; that there is no interchange or division of freight rates between such Railroad and such Street Railway; *and that demurrage on the incoming cars delivered by the New York Central begins to run when placed on the Street Railway's siding.* So that, in that regard, the Street Railway acts only as agent for the consignee and, so far as the Railroad is concerned, delivery to the consignee is complete when the cars are delivered to the Street Railway Company. The record shows also that all cars so delivered are returned empty to such Street Railway siding, there to be picked up by the crews of the New York Central.

ARGUMENT

The appellants contend that the injunction in this case should not have been granted, for two general reasons:

A. That the village of Hubbard was not a proper party plaintiff in the District Court;

B. That the Interstate Commerce Commission had jurisdiction of the subject matter covered by the order of November 7th, 1921.

A.

WAS THE VILLAGE OF HUBBARD A PROPER PARTY PLAINTIFF?

1. Paragraph 1, of section 13, Interstate Commerce Act (Comp. St. Sec. 8581), authorizes any "body politic or municipal organization," to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. Paragraphs 2 and 3, of such section, as amended June 18th, 1910, and February

28th, 1920, confers upon the Commission full power and authority to institute inquiries, on its own motion or on the petition of any carrier, into any rate or fare made or imposed "by authority of any state."

Under the statutes of the State of Ohio, as they stood at the time the franchise in question was granted, full and exclusive authority was delegated to the municipality granting the franchise to any street railway to determine the rates to be charged by such street railway.

It is the law of Ohio that such franchise grants are contracts binding upon both parties, and that the State of Ohio may not impair the obligation thereof. Where such franchise fixes the rate of carriage beyond the limits of the municipality granting it, it is within the power conferred upon municipalities by the Legislature of Ohio, and is valid and binding between the parties to it.

Interurban Ry. etc., Co. v. City of Cincinnati, 93 O. S. 108;

Interurban Ry. Co. v. Public Utilities Commission, 98 O. S. 287;

City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517;

Columbus Ry., Power & Light Co. v. Columbus, 249 U. S. 399.

It follows, therefore, that the rates prescribed by such franchise are rates "imposed by authority" of the State of Ohio. Obviously, also, from a consideration of the entire section, if a franchise contract made by a municipality with a carrier is the basis of the inquiry, that municipality should be made a party and be given an opportunity to be heard; and, if so, it has the same

right as any other party in interest to seek redress against an erroneous or unlawful order of the Commission. In the instant case, the village of Hubbard was made such a party to the proceeding before the Commission, entered its objections to the jurisdiction of the Commission to raise rates, and was heard upon such objection.

2. The statutory court in its opinion, *Village of Hubbard, Ohio, v. United States, et al.*, 278 Fed. 754, 759, 760, also adds this observation:

> "It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the Commission and to be heard in court against its orders. See Judson on Interstate Commerce, (3d Ed.) § 437. In *City of New York v. United States et al.* (D. C.) 272 Fed. 768, a municipal corporation, the city of New York, was the party plaintiff, and, although relief was denied on the merits, it was expressly held that the city's interest was such as entitled it to maintain the action."

3. In Ohio, municipal corporations, when parties to a franchise contract, are authorized to bring proceedings to enjoin its violation, or to enforce its terms.

> *G. C.* § 4311, 4312;
> *L. S. & M. S. Ry. Co. v. Elyria*, 69 O. S. 414, 421-23;
> *City of Springfield v. Springfield Gas Co.*, 12 Ohio C. C. (N. S.) 392, affirmed without report, 81 O. S. 537.

If the order of the Commission is *valid*, it is an effectual bar to the prosecution of any such action by the Village of Hubbard. If it be *invalid*, the determina-

tion of its invalidity is a necessary condition precedent to the effective prosecution of any action, either to enjoin a violation of the terms of the franchise, to enforce such terms or to secure its forfeiture.

If a municipality has no right to attack an invalid order of the Interstate Commerce Commission affecting a franchise contract theretofore entered into between such municipality and a street railway, then it is left wholly without remedy to prevent the street railway from exercising all the privileges *granted* by the franchise to *it* while refusing to comply with the conditions and obligations *imposed* by the *municipality* for the exercise of such privilege.

4. In the late case of the *State of New York, et al., v. United States, et al.*, 257 U. S. 591, this Court, while it affirmed the action of the District Court in dismissing the original bill, seemed to have had no question that the State of New York was a proper party. The status of the Village of Hubbard, as party plaintiff in the case below, seem to us analogous to that of the State of New York in the case cited.

5. Section 1, of the Commerce Court Act, 36 Stat. L. 539, in providing for the jurisdiction of such court, reads:

> " • • • Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."

Section 5, of such Act, reads:

> " • • • *Provided further*, that *communities* • • who are interested in the controversy or question before the Interstate Commerce Commission, or *in any suit* which may

> be brought by any one under the terms of this Act, or the Acts * * which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors *may prosecute, defend or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of United States therein.*" (Italics ours.)

By the terms of the statute abolishing the Commerce Court (38 Stat. L. 219), the jurisdiction formerly vested in said court was transferred to the several district courts of the United States. The Act provides:

> "The procedure in the District Courts in respect to cases of which jurisdiction is conferred upon them by this Act, shall be the same as that heretofore prevailing in the Commerce Court."

If an interested community has the right to intervene in any suit or proceeding brought by the Attorney General to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission, and has the right to prosecute or defend said suit or proceeding "unaffected by the action or non-action of the Attorney General", how can it be logically contended that such interested community has not the right in the first instance to bring an action for that purpose?

Surely it cannot be contended that the incorporated Village of Hubbard, which was made a party to

the proceedings before the Commission, and which had granted the franchise whose obligations were set aside by such order, is not a "community * * * interested in the controversy or question before the Interstate Commerce Commission".

B.

HAD THE COMMISSION JURISDICTION TO MAKE THE ORDER COMPLAINED OF?

It is certain that, under the original Act of February 4th, 1887, 24 Stat. L. 379, the Interstate Commerce Commission had no jurisdiction to make the order complained of. *Omaha & Council Bluffs St. Ry. Co., et al., v. Interstate Commerce Commission, et al.*, 230 U. S. 324. It does not possess such jurisdiction now, unless that jurisdiction has been expressly conferred by the later amendatory provisions.

Our contentions are:

I. That the Commission does not have such jurisdiction, unless the purpose to confer it is manifestly evident in some valid Federal Statute;

II. That the purpose to grant to the Interstate Commerce Commission the power to regulate the fares of electric street railways, of the character of said appellant, is not only not *clearly manifest* in the context of the Commerce Act, and the various acts amendatory thereto, but is *manifestly negatived* by the express provisions of the Act;

III. That, were the jurisdiction given, nevertheless, the order in question goes beyond the limitations

upon the powers of such Commission, as such limitations are defined in the "Wisconsin Rate Case".

I.

PURPOSE TO CONFER JURISDICTION NOT MANIFEST.

In determining this question, it is to be remembered that the rule of construction, applicable to acts of Congress encroaching upon the power of a state to regulate and control the transportation of passengers and property within a state, is one of strict construction and will not include intrastate traffic, unless such intent is plainly expressed. In *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 510, Mr. Justice Van Devanter, speaking for the court, says:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

We do not contend that, in a proper case, where the Interstate Commerce Commission *has jurisdiction over the subject matter*, it may not make a valid order relative to *intrastate* rates, wherever such regulation of intrastate rates is *merely incidental* to the regulation of *interstate* commerce *and necessary to its efficiency.*

II.

THE JURISDICTION CLAIMED BY THE INTERSTATE COMMERCE COMMISSION IS NOT CONFERRED BY ANY FEDERAL STATUTE

1. Nowhere, either in the Interstate Commerce Act, as amended in 1910, or in the Transportation Act of 1920, is any reference made to street railways, urban or interurban, aside from the excepting-provisos of the acts.

These exceptions may be summarized as follows:

(*a*) The Transportation Act of 1920, section 402, paragraph 22 (Ch. 91, 41 Stat. L. 478) provides that the Act shall not extend to the construction or abandonment of spur, industrial, etc., tracks located wholly within the state "or of street, suburban, or interurban electric railways, which are not operated *as a part or parts of a general steam railroad system of transportation.*"

Although this Court had held in *U. S. et al., v. R. R. Co. et al.,* 226 U. S. 14, that the original Act did not apply in such case, nevertheless, Congress, out of an abundance of caution, and because of the fact that the Interstate Commerce Commission, despite this decision and that in *Omaha & Council Bluffs St. Ry. Co., et al., v. Interstate Commerce Commission, supra,* continued to exercise jurisdiction over street railways, made this exclusion of jurisdiction a matter of statutory enactment.

(*b*) Section 439 of the same Act (Ch. 91, 41 Stat. L. 494), which added to the Interstate Commerce Act

new section 20a, in defining the term "carrier" as used in section 20 of the Act, reads:

> "As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is *not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." (Italics ours.)

(*c*) In section 300, title 3, of the Transportation Act—creating the Labor Board to deal with disputes between carriers and their employees—it is provided, among other things:

> "When used in this title—1. The term "carrier" includes * * any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban or suburban electric railway not operating as a *part of a general steam railroad system of transportation.*" (Italics ours.)

(d) Paragraph 3, of section 15 of the Act, provides for the establishment of through routes, joint classifications and joint rates, etc., between carriers, subject to the operation of the Act. It provides, among other things:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the *general* business of transporting freight in addition to their passenger and express business, and railroads of a different character;" (Italics ours.)

(*e*) New section 15a of the Commerce Act, as amended by section 422, (Ch. 91, 41 Stat. L. 488)

from which, if at all, jurisdiction to make the order in question can be claimed to be derived, reads in part as follows:

> "When used in this section * * * the term "carrier" means a carrier by railroad * * * subject to this act, excluding, * * * (b) street or suburban electric railways unless operated as a *part of a general steam railroad system* of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or *engaged* in *the general transportation* of freight." (Italics ours.)

(*f*) Section 204, of the Transportation Act, (41 Stat. L. 460), relating to reimbursement of deficits during Federal control, in part, is as follows:

> "When used in this section—The term "carrier" * * * does not include any street or interurban electric railway which has as its *principal source* of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both." (Italics ours.)

(*g*) Section 209 of that Act (41 Stat. L. 464), relating to guaranty to carriers after termination of Federal control, reads, in part, as follows:

> "When used in this section—The term "carrier" * * * does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its *principal source* of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both." (Italics ours.)

In view of these provisions, does a street railway,

of the character in question, come within the purview of the Interstate Commerce Act, as amended by the Transportation Act of 1920?

Ordinarily, the term "railroad" does not include a street railway. In *Omaha & C. B. St. R. Co., et al., v. Inters. Com. Com.*, 230 U. S. 324, 335, this Court quotes with approval the language of the Court of Appeals of Kentucky:

> "A street railroad, in a technical and popular sense is as different from an ordinary railroad as a street is from a road."
>
> *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. 175.

On the other hand, where the context of the statute and the purpose intended to be accomplished by the Act require it, the term "railroad" is often held to embrace a street railway. The meaning of the term must always be determined by construing the statute as a whole.

In *Omaha & C. B. St. R. Co., v. Inters. Com. Com., supra,* (bot. p. 335, 336), this Court says:

> "But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "railroad" will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

It is for this reason that we have quoted so voluminously from the statutes in question.

Section 15a makes its first appearance, as section 422, in the Transportation Act of 1920. Paragraph 4,

of present section 13, of the Commerce Act, was amended into its present form as Section 416 of the Transportation Act, (41 Stat. L. 488).

Mr. Chief Justice Taft, in delivering the opinion of the Court in the Wisconsin Rate Case, points out at length the primary reasons animating the passage of the Transportation Act. None of these apply to the embodiment within the purview of that Act of a street railway of the character in question. So that, as far as the *purpose* of the Transportation Act is concerned, there is no reason to suppose that there was any intention to include, within its purview, electric street railways generally. When we look to the *language* of the excepting provisos, above quoted, this conclusion is still more apparent.

If, as suggested in the Wisconsin Rate Case, paragraph 4 of section 13, and section 15a should be construed together as defining the power of the Commission over intrastate rates, we must conclude that such power can be only exercised in any event, as to the rates of an electric street railway, where:

(*a*) Such railway is "operated as a part of a general steam railroad system of transpor"; or

(*b*) Is *engaged* in the *general* transportation of freight.

2. Assuredly, the Pennsylvania-Ohio Power & Light Company is not operated as a part of a general steam railroad system of transportation.

The only steam railroad with which it has any switch connections is the New York Central. One of these, as we have shown above, is a private switch, and

the other, a railroad siding. There is no traffic arrangement between the two companies, nor is there any division of freight rates. On the other hand, demurrage is charged upon cars delivered by the New York Central to such street railway as soon as the cars are delivered to the latter's line. Thus, the railroad treats the railway as the agent of the consignee for purposes of delivery.

3. Nor, as we view it, is such street railway *engaged* in the *general* transportation of freight. It is true that the record shows that, in two years, it received 922 cars of freight from the New York Central Railroad —an average of about 9 cars a week. Tri-weekly, a through car, for the transportation of freight and express packages, is operated from Sharon, Pennsylvania, to New Castle, Pennsylvania. It originates no freight, however, for delivery to the New York Central, nor does it originate any of the freight or express carried by this tri-weekly service. Such service begins and ends over lines other than that of the Pennsylvania-Ohio Power & Light Company. Its line only furnishes a connecting link between the lines of the other two companies.

The revenues, received from freight and express service combined, amount to but seven per cent. of the total revenues of the Company. No schedule of freight tariffs is filed with the Interstate Commerce Commission, as would be required were the Company *engaged* in the *general* transportation of freight.

The Company charges whatever it sees fit—in short, what the traffic will bear. If the boot were on the other foot, and if shippers were endeavoring to com-

pel the Company to accept freight, it unquestionably would be before the Commission loudly protesting that it was not a "carrier, subject to the provisions of the Act"; that it had no facilities for handling freight; that it only possessed three old and light-weight freight cars; that its road-bed was not fitted to carry heavy freight over it; and that, for it to undertake to handle freight, would be to the detriment of the primary purpose for which it was organized, and for which it received its various franchises; namely, as a carrier of passengers for hire. All of which contentions, would be well founded, as shown by the record in this case.

How, under such conditions, can it be successfully contended that such street railway is engaged in the *general* transportation of freight? It is true, that it is engaged in the *transportation* of freight, but is it engaged in the *general* transportation of freight?

It is an old and familiar rule of construction, laid down in scores of cases, that:

> "That construction of a statute is to be favored, and must be adopted if reasonably possible, which will give meaning to every word, clause, and sentence of the statute and operation and effect to every part and provision of it." *Black on Interp. of Laws*, 2 Ed. 322, and cases cited.
>
> *U. S. v. Daniels*, 279 Fed. 844, (2 Ct.);
> *Dwight & Lloyd Sintering Co. v. American Ore Reclamation Co.*, 263 Fed. 315 (2 Ct.); Certiorari denied, *American Ore, etc. Co. v. D. & L. S. Co.*, 252 U. S. 582.

In *U. S. v. Ninety-Nine Diamonds,* 139 Fed. 961 (8 Ct.), the first paragraph of the syllabus is as follows:

> "All the words of the statute should have effect. The intention of the enacting body is not expressed by a part, but by all of the statute; and as the purpose of construction is to ascertain that intention, 'all the words of a law must have effect rather than that part should perish by construction.' "

If Congress had intended that, wherever a street railway carried freight, it should be subject to the provisions of the Acts in question, it surely would have said so. When it enacted that such street railways only, as are engaged in the *general* transportation of freight, shall be subject to the Act, it surely used the word *"general"* advisedly.

A street railway that is engaged in such a limited transportation of freight as the one in question, that initiates not a pound of freight, that receives and carries only such as it desires, and charges for such carriage only such rates as it sees fit to charge, can surely not be said to be engaged in such *general* transportation.

4. A consideration of sections 204 and 209, *supra,* of the Transportation Act, (the former section, relating to the reimbursement of deficits during Federal control, and the latter, to guaranty to carriers after termination of Federal control) would lead to the conclusion that no street or interurban electric railway is engaged in the general transportation of freight, where its *principal* source of revenue is from passenger traf-

fic, and the sale of power, heat and light. Each of these sections provides that the term "carrier" shall not include a street or interurban electric railway, not under Federal control at the time Federal control terminated, "which has, as its *principal* source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat, or light, or both".

5. Counsel for appellants urge that, while the Pennsylvania-Ohio Power & Light Company may not have been engaged in the general transportation of freight, yet the Commission found that it was, and, therefore, its finding is binding upon this Court. To this, we reply, that this question is jurisdictional, and we do not believe that, even were the facts in dispute, the finding of the Commission, upon a jurisdictional question, would be conclusive upon this Court.

However, the facts are not in dispute, but appear in the report of the Commission itself. Its legal conclusion that the facts stated establish that the Pennsylvania-Ohio Power & Light Company is engaged in the general transportation of freight, is supported by no substantial evidence; and, therefore, if we are correct in our above contentions, the Commission was wholly without jurisdiction to enter the order complained of.

III.

THE ORDER IS OTHERWISE VOID

Even if the street railway is a "carrier", subject to the provisions of the Act, the order in question violates the specific proviso of the Commerce Act, that the

Commission is not to regulate traffic wholly within the state.

In the *Wisconsin Rate Case,* 257 U. S. 563, it is held that, despite the proviso of the Commerce Act that the Commission is not to regulate traffic wholly within the state an order by the Commission raising the intrastate rates to a level of the interstate structure, which order is *merely incidental* to the regulation of interstate commerce, and *necessary to its efficiency,* does not violate the proviso referred to.

The apparent extent of the limitation upon the power of the Commission is to be found in the opinion of the Court (bot. p. 590, 591):

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to *substantial* disparity which operates as a *real discrimination against* and *obstruction to,* interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

In the instant case, in contravention of its solemn contract obligations, the Pennsylvania-Ohio Power & Light Company raised its rates from Hubbard to Sharon. No part of its line was without the State of

Ohio, and only for a distance of one mile does it operate beyond the State limits, over the track of another company.

It makes such violation a ground for its petition, to the Interstate Commerce Commission, to order it to commit another.

As we have shown above, the State authorities, "exercising their appropriate discretion to deal with intrastate rates", refused to permit the street railway to enjoy the privileges of its franchise without complying with its obligations.

The Interstate Commerce Commission, however, under the guise of regulating interstate commerce, grants the prayer of the street railway to "order" it to again violate its contract.

If the existing condition presents a "real discrimination against and obstruction to" interstate commerce, and if the regulation of the *intrastate* rate through the Village of Hubbard and the City of Youngstown, and over the public highways of Trumbull and Mahoning Counties, Ohio, is "merely incidental" to the *interstate* traffic over a mile of another company's railroad, then, indeed, the tail wags the dog.

In *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, 547, the rule is laid down that the orders of the Commission are not final if, in the language of the Court:

> "The authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule

that the substance, and not the shadow, determines the validity of the exercise of the power."

We respectfully submit that the claimed grievances against interstate commerce, arising out of the carrying out by the Pennsylvania-Ohio Power & Light Company of the burdens imposed by its franchise, at the same time that it accepts its benefits, are more than shadowy. They are "made of such stuff as dreams are and as baseless as the fantastic fabric of a vision."

IN CONCLUSION

We respectfully refer the Court to the decision of the Court below, reported in 278 Fed. 754, where the reasons for that Court's decision are more ably set forth than we are able to put them.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NO. [redacted]26 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

BRIEF FOR THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

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IN THE

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THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

Statement.

This cause was appealed from the final order of the District Court which permanently annulled and enjoined the order of the Interstate Commerce Commission, Ohio and Pennsylvania Rates, Fares and Charges, 64 I. C. C., 517 (tr. 15). The order was originally made by the Commission on behalf of the Steubenville, East Liverpool and Beaver Valley Traction Company (Tr. 7). The order is (Tr. 15).

This order in effect directed an increase of fares, the Commission claiming the rates then in force conflicted with Interstate fares.

The lower Court found that the traction company is not an interurban electric railway operating as a part of a general steam system of railway transportation, nor is it engaged in the general transportation of freight in addition to its passenger service, and held the Commerce Commission was without jurisdiction to hear and determine the controversy.

The City desires to cite the case as reported, *The City of Wellsville vs. The United States,* 278 Fed. Rep., 769; and *Village of Hubbard vs. United States,* 278 Fed. Rep., 754, (Tr. 33).

This traction company by its predecessors first obtained a franchise from the City of Wellsville and from the City of East Liverpool, Ohio, for local street car service between the two cities, in 1891, and this grant has been renewed from time to time and still has about eight years to run.

In 1907 the franchise was again renewed for 25 years, and at this time the line was double tracked and it connected with another line running down the Ohio Valley to Steubenville, Ohio, also up the Valley to Beaver, Pennsylvania.

In the year 1916 the defendant traction company by merger or lease or purchase acquired street car lines, enabling it to run cars over the tracks under its control into Pennsylvania, West Virginia from Ohio.

The local ordinances provided for a five cent fare and the order of the commission greatly increased this fare. Record, page 10.

The company has no connection with any Steam line and the statement in brief for the United States is in error when it states at page four that the Traction Company connects with the Pittsburgh and Lake Erie Railroad as it merely runs to a place near to the Railway depot in Beaver and passengers who so desire may walk to the depot of the Steam Railway.

The Traction Company has no connection with any Steam line for carrying freight and handles but one freight car so called on a part of its lines each day from Steubenville to Midland, and a through freight car runs once a week from Steubenville to Beaver.

It handles no baggage. Record, page 8.

The freight business is so small a part of the earnings that the Commission in its report ignores the amount received from this source.

The lower Court found in 278 Fed., 769, *Wellsville vs. United States et al.,* that the amount of freight earnings are so small that they were not reported separately but included under gross earnings.

If any question is raised as to a direct connection with any Steam Railroad the City of Wellsville requests that it be allowed a diminution of the record of evidence taken by Interstate Commerce Commission on this question, as there is no direct physical contact by

this Traction Company with any Railroad and no cars of freight or passengers are switched from one concern to the tracks of the other, and they do not exchange passengers with any Steam Railroad, except as they run near to the depots of Steam Carriers or past the same and passengers alight from the traction cars and go to the Railway from the Railway to the Street cars. It is of course possible and no doubt true that these carriers do arrange schedules making it easy for passengers to do this.

The order of the Commission in this case was made by a divided vote of four to five.

The City does not desire to burden the record by a further physical description of this Traction Company line as it appears to be fairly described in the briefs filed and in reported cases of the same cited above.

Argument.

The City of Wellsville asserts that this case should be dismissed for the reason the same has been ended and there now exists only a moot question to decide.

On January 10, 1923, by Ordinance No. 984, passed by Council of the City of Wellsville, Ohio, and approved by the Mayor, and accepted by the Traction Company defendant herein, and by Ordinance No. 1877 duly passed by the Council of the City of East Liverpool, Ohio, April 16, 1923, and approved by the Mayor and accepted by the Traction Company, all questions of fare were duly adjusted by the parties and the Traction Company is now and has ever since the adoption of said ordinances, been operating its cars under the same.

As the only object in this case was to secure higher rate of fare and this has been since the decision in the lower Court adjusted, the City feels this cause ought to be dismissed.

It is contended that the City of Wellsville has no such interest in this controversy that it is entitled to be heard and that it cannot maintain this action.

The general rule is that an interested party may maintain a suit to secure any right properly coming to it of which a court would have jurisdiction.

In Ohio the Cities are given the right to make franchise ordinances, such as in this action give the traction company a right to operate on the streets, it

has been repeatedly held by the Supreme Court of Ohio, that cities have such rights and that such a contract is one that the Courts will enforce. In an unreported case the Supreme Court of Ohio held that the City of Wellsville could enforce the contract in controversy in this matter, and that it had the right to compel the traction company to maintain reasonable service, when the company refused to operate its line.

The rate of fare is a question vitally affecting a city, and when the Inter State Commerce Commission undertook to take jurisdiction in this case, before any order was made, the City of Wellsville was served with notice to be present and was present and filed a brief.

When the order raising the rate of fare was made by the Commission the City was notified.

Under Section 968 United States Statutes, as printed in Barnes Code at page 236, a provision is made allowing a suit to be begun to annul and enjoin the order of the Commerce Commission, and this is the Statute the City invoked to begin this action.

The next Section 969 provides who shall hear the case.

We submit that this Statute gives the City a right to maintain this suit.

Section 7922, Barnes Code, page 1898, further provides that it shall be lawful to include as parties, in addition to any carrier, all persons interested in or affected by any such order, made by the Commission.

We insist that if a franchise contract is involved as in this case, when the contract was made between the City and a carrier, the municipality ought to be made a party, and be heard, the same as any other party, in interest to seek redress for any property right it has involved, as against an erroneous order of the Inter State Commerce Commission.

It has even been the practice to permit representative association and exchanges to institute and maintain proceedings before the Commission and to be heard in Court against its orders.

City of New York vs. United States et al., 272 Fed., 768.

In this case the City of New York was a party plaintiff and was heard by express order of the Court.

Also 257 U. S., 591, *State of New York vs. U. S.*

Ohio Cities, may be parties to actions to enjoin violation or to enforce the terms of a franchise.

Ohio General Code, 4311 and 4312.

Springfield vs. Springfield Gas Co., 12 C. C. R. (N. S.), 392, affirmed no report, 81 O. S., 537, 91 N. E., 1139.

In the *Wisconsin Rate Case*, 42 Supreme Court, 232, and in all the other reported cases the States are allowed to begin the same kind of case as is involved in this one by the City as plaintiff. The City gives the

franchise grant by authority given it by the State or not reserved by the State.

Interurban and Terminal Ry. vs. City of Cincinnati, 93 O. S., 108;

Interurban Railway and Terminal Co. vs. Public Utilities Commission of Ohio, 98 O. S., 287;

The Columbus Railways and Power Co. vs. Columbus, Ohio, 249 U. S., 399.

POSITION OF THE CITY OF WELLSVILLE.

The position of the City of Wellsville in this proceeding is as follows:

1. The Commission had no jurisdiction to enter any order changing the rates, fares, and charges fixed by ordinance for intra state hauls or journeys.

2. That the transportation act of 1920, does not give jurisdiction to the I. C. C. over street, suburban, or interurban railway, rates, fares, and charges of a company of the character such as the one involved in this proceeding.

3. Assuming jurisdiction, discrimination has not been proven or shown or found.

PART I.

Law.

"A"

Decisions of the Supreme Court of the United States and of the State of Ohio, showing that a franchise ordinance, passed by a municipality and accepted by a street car company constitutes a binding contract, and, that the street car company operating under it is bound by its terms.

ALSO SECTIONS OF GENERAL CODE OF OHIO AND CONSTITUTION.

Also, that the terms cannot be abrogated under the police powers of a municipality or a state. Showing, further, that a company which takes over another company, to which a franchise ordinance had previously been given is bound by the terms and conditions imposed upon the original company. And, showing further, that the mere fact that a franchise contract turns out to be an unprofitable venture is not sufficient reason for a Court to interfere with its terms.

Interurban Railway & Terminal Company et al. vs. The City of Cincinnati, 93 O. S., page 108, the syllabus reads as follows:

An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: "Should the village of Pleasant Ridge be annexed to the City of Cincinnati, the rate

of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents." The company thereafter duly accepted the franchise and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. Held: the acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control.

It appears in this case on page 110 that the Interurban Railway & Terminal Company is a consolidation of other companies among which was the Rapid Railway Company to which the original franchise was given, and that the present company is operating under and by virtue of the franchise ordinance originally given to the Rapid Railway Company. And, as above indicated, the Court held that the consolidation company was bound by the terms and conditions imposed upon the original company.

The franchise ordinance originally given in this case was in 1901, at which time the laws pertaining to the rights of municipalities to give franchises to street car companies was the same as in 1906, when the City of Wellsville gave the franchise to the traction company in the case at bar.

On page 123, the Court, towards the conclusion of the opinion rendered in this case uses the following language:

"It is insisted that the enforcement of the terms

of the franchise under inquiry here will work hardship and irreparable injury to the company; and cases are cited in support of the accepted proposition that neither the state nor any of its agencies can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. It implies a meeting of minds. It is much to be regretted if the amount which the interurban company is required to pay to the Cincinnati Company for the use of its tracks is too large a proportion of the fares received, and it is equally to be regretted if the fare provided by the contract itself does not furnish a compensatory return to the company. The presumption is that it was to the interest of the village and to every municipality to provide such a compensation for the services to be rendered by the public utility as will induce the investment of the capital necessary to the furnishing of the service. In fact, it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation. It is equally the duty of the company not to contract to perform a service for less compensation than is proper.

But we are not able to see how the Court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof."

The Interurban Railway & Terminal Company vs. The Public Utilities Commission of Ohio, 98 O. S., 287. Decided June 21st, 1918.

In this case the Supreme Court approved and follows the principle set forth in 93 O. S., 108. And in proposition one of the syllabus gives the following language:

> "1. When the terms of a valid ordinance granting a franchise to a street or interurban railway company are accepted by the grantee, such action constitutes a contract between the parties. As long as the company retains a franchise and operates its road thereunder its terms must control."

This case further holds that contracts of that kind are protected by the consolidation and that the Public Utilities Commission of Ohio does not possess the right to change the terms of these contracts as designated by the franchise ordinances.

On that proposition, paragraph three and four of the syllabus read as follows:

> "3. A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the constitution, and the police power cannot be invoked to abrogate or impair it.
>
> "4. The statutes of Ohio which create the Public Utilities Commission and define its powers do not confer authority on the commission to change rates fixed by the terms of valid contracts made by

a public utility with a municipality in the exercise of powers clearly conferred upon it."

It may be that the franchises which were granted to The Steubenville, East Liverpool and Beaver Valley Traction Company's predecessors and to which that company succeeded are not at the present time so attractive as they were at the time they were granted, but this does not bring to an end the obligations of the valid contracts entered into with the municipalities. As stated by the Supreme Court in the case of *Columbus Railway and Power Company vs. Columbus,* 249 U. S., 399, 414 (April 14, 1919):

> "It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the Company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter."

The statutes in existence in Ohio, with reference to the right of cities to give street railroad, suburban and interurban franchises have been fully set forth in Exhibit "D" filed in behalf of the cities. And, they show that the cities have power and authority to enter into such contracts. The Sections of the Statutes so filed

are found in the General Code of Ohio, and are as follows:

3768, 3777, 3778, 9100, 9101, 9113, 9131, 9132 and 9133.

Also refer to Sections 4 and 5 of Article 18 of the Constitution of the State of Ohio, which also gives the right to cities to enter into such franchises.

"B"

The parts of the "ACT TO REGULATE COMMERCE AS AMENDED BY THE TRANSPORTATION ACT OF 1920," which shows that there is no jurisdiction of the Commission in cases such as are involved in this proceeding.

SECTION 15—Paragraph 3.
SECTION 15—A Sub-division "B" and "C."
SECTION 20—A—(1).

"C"

Giving excerpts of decisions rendered by the Commission itself, prior to the passage of the Transportation Act of 1920, in which the Commission sets forth the limits of its powers under Section 3 of the Commerce Act, where it was called upon to remove discriminations.

"We have held that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored." *Board of Trade of Chicago vs. A., T. & S. F. Ry.*, 29 I. C. C., 438, 443.

"Where the allowances prescribed by law for

local shipments are paid, lower charges result on local than on export shipments, but MERE DIFFERENCES IN CHARGES DO NOT ESTABLISH UNJUST DISCRIMINATION." *Shands vs. S. A. L. Ry. Co.,* 34 I. C. C., 214, 215.

"Not all discriminations are unlawful, but only those that are unjust." *American Coal & Coke Co.,* 36 I. C. C., 195, 197.

"The testimony as to the alleged unjust discrimination in grain rates was exceedingly meager and unsatisfactory, CONSISTING CHIEFLY IN A SHOWING OF THE PRESENT RELATION OF THE RATES THEMSELVES. IT AFFORDS NO ADEQUATE BASIS FOR A FINDING THAT UNJUST DISCRIMINATION EXISTS." *Holmes & Hollowell Co. vs. Great Northern Ry.,* 37 I. C. C., 627.

"The provisions of the act against unjust discrimination speak to the carriers of the country individually and with respect to those things for which they are individually responsible, and not to the carriers as parts of a single great system." *Galloway Coal Company et al.,* 40 I. C. C., 311, 315.

"Shippers at Nashville compete with shippers at Chattanooga, Tenn., and similar points. The switching charges maintained at these points are not based on cost, but there is no evidence that Nashville shippers would be handicapped by the charges proposed at Nashville in meeting such competition. Respondents challenged protestants to show in what way and to what extent shippers at Nashville would be injured but without eliciting any convincing replies. Not every difference in

rates to competing points from common points of origin constitutes unjust discrimination—*City of Astoria vs. S. P. & Ry. Co.,* 38 I. C. C., 16—and different switching charges at competing points may also be entirely equitable." *I. & S. Docket No. 758. Nashville Switch Case,* 40 I. C. C., 483, 496.

"The mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the Act. The State Public Utilities Commission of Illinois, acting within the scope of its authority, has the undoubted right to prescribe rates of freight applicable to movements of traffic by railroad wholly within the State of Illinois. In a case which merely calls to our attention the fact that a state rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the state rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate. It is only in cases where the rates prescribed by the state authorities necessarily operate to unduly prefer a state over an interstate shipper, or to otherwise interfere with the proper application of rates prescribed by this Commission, that the authority of the federal law is properly to be exercised." *Memphis Merchants Exchange, et al., vs. Illinois Central Railroad Company, et al.,* 43 I. C. C., 378.

"We must, to make a finding of discrimination, be shown the fact of discrimination, not merely the

difference in ratings without the cause and reason for the difference. Uniformity is desirable and in some instances it is necessarily required; but its absence does not *prima facie* connote illegality, as differences in transportation conditions may, and frequently do, require a deviation from uniformity in particular instances to accomplish the legality and reasonableness of rates which the law exacts." *National Confectioner's Association, et al., vs. Aberdeen & Rockfish Railroad Company, et al.*, 49 I. C. C., 566, 576.

"It is well settled that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that generally a competitive relation between the commodities must appear." *Board of Trade of Chicago vs. A., T. & S. F. Ry. Co.*, 29 I. C. C., 438, 443. *California Walnut Growers' Association, et al., vs. Aberdeen & Rockfish Railroad Company, et al.*, 50 I. C. C., 558, 568.

In *City of Astoria vs. S. P. & S. Railway Company*, 38 I. C. C., 10, January 22, 1916:

The Commission emphasized the point that in order to constitute unjust discrimination within the meaning of the act, the rates complained of must adversely affect the commerce of one point and thereby materially benefit the commerce of another. In discussing the issues, the Commission stated as follows (at page 24):

"It has long been a settled doctrine in this Commission that the mere maintenance of higher rates to one point than to another is not an unjust

discrimination within the meaning of the act; it is only when the general conditions of transportation and the general circumstances surrounding the traffic are substantially similar and such a rate, relationship adversely affects the commerce of one point and thereby materially benefits the commerce of the other point, that it may be said to involve the preferences and discriminations prohibited by law, as between different communities served by the same carriers."

The case of *Huston & Texas Railway Company vs. U. S.*, 234 U. S., page 342:

This case is commonly known as the "SHREVEPORT" case and is frequently cited by the carriers to show that the Interstate Commerce Commission has a right to remove a discrimination against interstate commerce by ordering that the intrastate rates be raised to the level of interstate rates.

The Court, on page 356, says:

"It is apparent from the legislative history of the act, that the evil of discrimination was the principle thing aimed at."

"D"

Cases in which street railways have been defined and differentiated so far as the Interstate Commerce Act is concerned. Also showing right of street car companies to carry freight in the State of Ohio, etc.

Omaha and Council Bluffs Street Railway Com

pany vs. Interstate Commerce Commission, 230 U. S., page 324. On page 336 of this case the Court said:

> "Street railroads are local, are laid in streets as aids to street traffic, and for the use of a single community even though the community be divided by state lines or under different municipal control. Street railroads transport passengers from street to street, from ward to ward, from city to suburb."

And again (page 338):

> "The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs."

The court pointed out the characteristics of ordinary railroads as distinguished from street railroads as follows (at page 336):

> "* * * Ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. * * * The commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and Territories,' 'between

the United States and foreign countries.' * * * The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in 'every depot, station or office where passengers or freight are received for transportation.' The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

On page 337, the Court uses the following language in its opinion:

"A new type of interurban railway has been developed which, with electricity, as a motive power, uses larger cars and runs thru the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed."

We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight.

In the case of *In re Avon Beach & Southern Ry.*, 16 O. D. (N. P.) 87, Judge Washburn stated as follows (at page 94):

"* * * The legislature has been careful to keep the laws in reference to each (street railroads and steam railroads) separate and distinct; and

has enacted, that whatever their charters are, they shall be judged as to which they really are, for purposes of taxation, by the manner of their construction and operation, and the character of the business they engage in.

"Plaintiff (street railroad) will not claim that it should be taxed as a steam railroad, nor that the fellow servant statute, applicable to steam railroads, is applicable to it. *It hardly seems proper to permit a company to do one thing under the guise of doing something else, and to claim the rights and benefits of one class of railroads, and escape the disadvantages and liabilities of that class.*" (Italics ours.)

IN REGARD TO CARRYING FREIGHT.

In Ohio the courts have held that this cannot be the test, in fact, that municipalities may not even deny the right to a street railway of carrying freight. This fact is squarely stated in the case of *Ohio vs. Dayton Traction Company*, 18 O. C. C., 490, 496. The second proposition of the syllabus in that case is as follows:

"The Council of a city may refuse permission to a street railway company to construct its road in its streets, but if it grants permission, it may not do so upon the condition that the company does not exercise one of its corporate powers, and therefore a condition or regulation that the Company shall not carry freight is void."

The judgment of the lower court in the above case was affirmed by the Supreme Court of Ohio on appeal in *Ohio vs. Traction Company*, 64 O. S., 272.

"E"

Authorities and decisions supporting the propriety of reference to Legislative proceedings, and showing that the words "undue burden" were stricken out by the conference committee and in their place written in, "UNDUE, UNREASONABLE OR UNJUST DISCRIMINATION."

It appears to be well settled that when an act to be construed is capable of various interpretations, reference may be had to representations made to Congress, and to testimony before committees, to committee reports, and to statements made concerning the purpose and meaning of the bill while under consideration in either house by the committee member having the bill in charge.

Holy Trinity Church vs. United States, 143 U. S., 457, 464; *Johnson vs. Southern Pacific*, 196 U. S., 1, 19; *Houston & Texas Railway vs. United States*, 234 U. S., 342; *Caminetti vs. United States*, 242 U. S., 470, 490; *Corona Coal Company vs. Southern Railway*, 266 Fed., 726, 732; *Duplex Printing Company vs. Deering*, U. S. Supreme Court, unreported.

In the case last cited, this court laid down the rule concerning statements in debate and cited authorities as follows:

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the mean-

ing and purpose of the law-making body. *Aldridge vs. Williams*, 3 How., 9, 24; *United States vs. Union Pacific R. R. Co.*, 91 U. S., 72, 79; *United States vs. Freight Association*, 166 U. S., 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns vs. United States*, 194 U. S., 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns vs. United States, supra.; Penna. R. R. Co. vs. International Coal Company*, 230 U. S., 184, 198-199; *United States vs. Coca Cola Co.*, 241 U. S., 265, 281; *United States vs. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318."

Courts have often held that in construing statutes consideration should be given to their legislative history.

In the case of *Connole vs. Norfolk & Western Ry. Co.*, 216 Fed. Rep., 823 (September 2, 1914), District Judge Sater stated as follows (at page 825):

"If the refusal of a legislative body to narrow comprehensive language shows an intention to enact a comprehensive statute, then the converse of that proposition is also true, and if it appears that by amendment words of enlargement are stricken out and words of limitation inserted in

their stead, the court shall hold that the legislative intent was to restrict."

In the case of *In re Valhoff*, 238 Fed. Rep., 405 (November 23, 1916), the District Court of the United States for the Southern District of California stated as follows (at pages 407, 408):

> "The history of a statute, from the time it was introduced until it was finally passed, may afford some aid to its construction. The reports of committees, the introduction of amendments, and the opposition made to the passage of a statute in its various forms, are legitimate aids to its construction."

Many other decisions of the Federal Courts and of the Supreme Court of the United States might be cited to show that consideration should be given to legislative history in interpreting and construing statutes.

The situation in the present case is a striking demonstration of the fact that the persons who appeared before the Interstate Commerce Committee of the House of Representatives and urged the elimination of the "undue burden" clause had a true conception of the use to which the railroads might seek to put this clause were it enacted into law.

"UNDUE BURDEN" PROVISION STRUCK OUT BY CONFERENCE COMMITTEE.

The Conference Committee struck out from paragraph (4) the words "undue burden" and wrote in their

place "undue, unreasonable or unjust discrimination," thereby making clear an intent to confine the operation of the law to what Judge Thom called "the discriminatory character of the rates," and not to extend it to what he called "undue inequality of rates." In such form the paragraph became, so far as its effect upon State power of rate regulation was concerned, a mere restatement of the effect of Section 3 of the Act, and left untouched the reserved power of the States over rates on traffic within their own borders, other than as such power was before limited by Section 3 of the Commerce Act.

ORIGIN OF WORDS "UNDUE, UNREASONABLE OR UNJUST DISCRIMINATION."

These words, "undue, unreasonable or unjust discrimination" were taken from Section 43 of a bill which had been introduced by Senator Cummins, known as the Cummins Bill, being S. 2906. This bill had passed the Senate as an amendment to H. R. 10453, and was under consideration by the Conference Committee. Section 43 proposed to amend Section 13 of the Commerce Act substantially as did Section 415 of H. R. 10453, except that the quoted words stood in the place of the words "undue burden."

S. 2906 was introduced on or about August 25, 1919, and various portions of H. R. 4378 were incorporated in it, with or without changes.

An effort has been made in this Brief, as much as reasonably possible, to cite at least one case to substantiate every material point which the Municipalities are basing their contentions upon. Perhaps the first two points thus raised by the Municipality can be treated together in this argument.

FIRST. This Commission was without jurisdiction to enter an order so far as the rates, fares and charges are fixed by franchise ordinances for intrastate hauls or journeys.

SECOND. That the "Transportation Act of 1920" does not give jurisdiction to the Commission over street, suburban or interurban railway fares, rates and charges, such as are involved in this proceeding.

The Supreme Court of the United States as well as the Supreme Court of Ohio has laid down the rule that where a franchise ordinance has been enacted by a Municipality and accepted by a traction company or similar utility that the franchise constitutes a binding contract. That such contract can only be changed by mutual consent of both of the parties to the same. That even the Public Utilities Commission of Ohio does not have a right to interfere where the rates or other terms have been so fixed by franchise. Where two or more companies have been consolidated into a later one or merged into one, and the merging company continues to operate in the cities under the franchise given to the first company, that the latter company is obliged to conform to all the terms, rates and regulations of the franchise so given to the original company.

The cases referring to the propositions above set forth are as follows:

Interurban Railway & Terminal Co. vs. The City of Cincinnati, 93 O. S., 108;

Interurban Railway & Terminal Co. vs. Public Utilities Commission of Ohio, 98 O. S., 287;

The Columbus Railway & Power Co. vs. Columbus, Ohio, 249 U. S., 399.

To further support the contention of the Municipality that the Commission is without jurisdiction in the premises attention is called to the following parts of the *"Act to Regulate Commerce, as Amended by the Transportation Act of 1920."*

Section 15—Paragraph 3.

"The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business and railroads of a different character."

Also, in Section 15-A (Added Feb. 28th, 1920, of the Interstate Commerce Commission Act). In the exception set forth in which this Act shall *not* apply, under sub-division "B" the following language appears:

"Street or suburban electric railways, unless operated as a part of a general steam railroad system of transportation."

And under "C" of the same section, the following exceptions appear:

> "Interurban electric railways unless operated as a part of a general steam railroad system or transportation, *or engaged in the general transportation of freight.*"

Section 439. The Interstate Commerce Act is further amended by inserting therein a new section between section 20 and section 21, to be designated section 20a, and to read as follows:

> "Section 20a (1). That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act."

The language of the parts above set forth clearly indicate to what extent the Interstate Commerce Commission has jurisdiction over street railways so far as the cities of Steubenville, East Liverpool and Wellsville are concerned.

SHOWING EVEN TRANSPORTATION OF FREIGHT DOES NOT GIVE JURISDICTION OVER THE COMPANY.

At this point it is desired to call attention of this Court to the particular points involved in this Argument. It develops the fact that the S. E. L. & B. V. T. Co. is a merger of a number of local street railways companies. For instance in the cities of East Liverpool, Steubenville and Wellsville, franchises were originally given by the respective cities to street car companies to do a street car business. In most instances the street car company travels exclusively within the respective cities and in all cases they are purely *intrastate*. The record shows that both in East Liverpool in the Steubenville, there are what is termed "city lines and interurban lines." Even I. C. C. No. 8, filed by this S. E. L. & B. V. T. Co., shows what is termed "THROUGH SERVICE RATES RUNNING FROM STEUBENVILLE, OHIO, TO POINTS IN PENNSYLVANIA AND WEST VIRGINIA," and shows what is termed "LOCAL SERVICE RATES IN STEUBENVILLE, OHIO," and "LOCAL SERVICE RATES FOR EAST LIVERPOOL AND WELLSVILLE, OHIO." The record shows by testimony of the traction company officials that the city and interurban lines are operated as *distinct lines*.

The local cars in practically all instances are smaller cars; the schedule of the local cars being much more frequent than that of the interurban cars; in some instances, particularly in Steubenville, for many squares the local lines run parallel to the interurban

lines and yet different tracks are used almost exclusively in the Cities of Steubenville and East Liverpool for the two different routes. As a matter of fact, according to I. C. C. No. 8, a higher fare is set forth for a ride in the Cities of Steubenville and East Liverpool on the interurban cars than the fare for the same distance and over the same parts of the cities on the local cars. The record further shows that most of the tracks of the local cars in the Municipalities travel on public streets and that no baggage is handled on these cars. There is some evidence showing that an express car occasionally runs over to the tracks of the local lines and that a freight car is run once a day from Steubenville to Beaver, which is the course of the interurban line. The records and Exhibits of the company show that they kept separate accounts of the operating expenses and income and of all other phases of the various lines.

It is submitted to this Court that the merger of this traction company made up of all the local companies was done of their own volition and without consultation or consent of the respective municipalities and that therefore this merger should not be permitted to change the character of the street car companies as they existed at the time that the franchises were given, by the cities. If it were conceded that a merger or consolidation could change the original character of a street car company it is quite obvious that an endless lot of confusion would result and that similar mergers or consolidations could be developed to such an extent that almost all the street railways in this country could be brought within the jurisdiction of the Commission.

It certainly does not seem reasonable that such a situation was ever intended by the farmers of the Interstate Commerce Act or that it would be tolerated.

Therefore, in view of the language of the parts of the Act, itself above set forth, it is contended:

That so far as the cities of East Liverpool, Steubenville and Wellsville are concerned, the companies operating in the respective cities are *"STREET, SUBURBAN OR INTERURBAN INTRASTATE ELECTRIC RAILWAYS NOT ENGAGED IN THE GENERAL TRANSPORTATION OF FREIGHT, NOR ARE THEY A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION"* and for those reasons do not come within the jurisdiction of the Commission. If, on the other hand, it would be found that the local street railway companies, by virtue of the merger of the present company, have become a part of an interurban interstate electric railway, it is then contended that it would not come within the jurisdiction of the Commission as provided in the Act itself, because *it is not operated as a part of a general steam railroad system of transportation nor is it engaged in the general transportation of freight.*

It is the contention of these cities that the fact that the S. E. L. & B. V. T. Co. had some express or freight business as developed by their testimony that it was not of such a degree or character that it would be termed *"the general transportation of freight."*

Another feature which presents itself in this connection, and which would seem to also be a strong cir-

circumstance and argument, why the Interstate Commerce Commission is without jurisdiction so far as the situations in Steubenville, East Liverpool and Wellsville are concerned, is this:

Assuming that the Commission in this proceeding would have a right to fix the rates so far as the respective cities are concerned in this proceeding, what would be the situation after the franchises, under which the company is now operating, had expired? Certainly, if the Commission had jurisdiction to fix rates, it should have jurisdiction and authority to perpetuate the company. Yes, it is doubted if anyone would seriously contend that the Commission could go so far.

It must be conceded that such rights rest within the cities thru which the company operates, and to divide up the powers and authority over the companies such as the traction company seeks to do in this proceeding would result in unusual confusion.

The Supreme Court of the United States in 230 U. S.—324 in the OMAHA case has fully set forth that the I. C. C. has no jurisdiction of street railways and has defined what they are so far as the Commission is concerned. It is claimed by the cities in this proceedings that the situation in the case at bar so far as the Municipalities are concerned would bring them within rule of this OMAHA case. Also the case of in re "AVON BEACH AND SOUTHERN RAILWAY; 16 O. D. (N. P.), 87 and the case of *Ohio vs. The Dayton Traction Company,* 18 O. C. C., 490, both of which are set forth in Part V-D of this Brief, throw considerable light on the

contention of the cities. The latter case established the rule in Ohio that a street railway, as one of its corporate powers has a right to carry freight. Therefore, under that rule, even tho it were conceded that the local railways in Steubenville, East Liverpool and Wellsville did carry some freight (which is denied by the cities), even then the Commission would be without jurisdiction in the premises.

The Transportation Act of 1920 should be construed as giving jurisdiction to the Commission in fixing the rates, fares and charges of street car companies as set forth in this proceeding, then the act is unconstitutional.

As touching this case, the power conferred upon Congress, Article 1, Section 8, Paragraph 3, of the Constitution of the United States is thus stated:

> "To regulate commerce with foreign nations, and *among the several States* and with Indian tribes."

By paragraph 18, of the same Section and Article, Congress is given power

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of United States, or in any department or officer thereof."

No power is given to Congress to go into and regulate the *internal affairs of any state or political subdivision thereof;* but, on the contrary, other provisions of the Constitution expressly forbid such action.

Article 10 of the Articles of Amendment adopted at the first session of the first Congress held on March 4th, 1789, reads as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited to it by the States, *are reserved to the States respectively or to the people.*"

The right to control its own internal affairs is a high (sovereign power of the individual State, and within this domain the jurisdiction of the State is as complete and conclusive as is that of the Federal Government in the regulation of commerce among the States.

This proposition has been stated and re-affirmed by the Supreme Court on numerous occasions. One of the last cases that reiterates this proposition is entitled *"THE ILLINOIS CENTRAL RAILROAD COMPANY vs. THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, ET AL.*, 245 U. S., 493. (Decided January 14th, 1918) on page 510, the Court says:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, *and except so far as, its purpose to do so is clearly manifested.*"

Among the powers thus expressly reserved to the States is the Police Power, and the power to make rates and to prescribe other regulations for railroads and utilities comes within the police power of a state.

This proposition also has been affirmed in numerous United States Supreme Court decisions. Among these decisions being that of the case of *in re "RAHRER,"* 140 U. S., page 540, and also the case of *Southern Carolina vs. United States*, 199 U. S., 437.

In the case of *Cleveland Telephone Company vs. The City of Cleveland*, in 98 O. S., 358, the same proposition was set forth by the Supreme Court of Ohio.

This particular question has been also raised before in other cases, and this Brief will not be encumbered by giving any further references or citations to it, excepting to state in conclusion that it is the belief that the Transportation Act of 1920 has not attempted to confer upon the Interstate Commerce Commission the power here claimed by the S. E. L. & B. V. T. Co.—but if it should be found that there is such jurisdiction, then it is most earnestly contended by these cities that such an attempt is clearly beyond the Constitutional power of any Congress to enact.

The fourth point raised by the Municipalities is the fact that, assuming for the sake of argument, that there is jurisdiction in this Commission to enter a change in the fares, rates or charges in the cities of Steubenville, East Liverpool and Wellsville, then *there is no evidence or at least not sufficient evidence in the record to justify such an order.*

The Commission, in its order issued in this case sets forth that an investigation be instituted to determine the reasonableness of the petitioner's interstate rates, and whether or not an *"undue or unreasonable advantage. Preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, etc.,"* if any, be found to exist.

If there is any relief at all, to which the traction company is entitled in this proceeding, or if any order or change of any kind so far as the rates in Wellsville is concerned, should be given, it is the earnest belief of the city that it could only be as a result of a finding on the part of the Commission that there was an undue, unlawful and unjust discrimination against interstate commerce in favor of intrastate commerce.

It is submitted that the company did not even attempt to introduce any evidence showing such a discrimination, but seemed content to make their case on the basis of mere *difference in rates* as set forth in I. C. C. #8. In other words, it is the same question which has been before the Commission so frequently within the recent year. It is the same question as to whether or not unjust and unlawful discrimination and undue burden are one and the same thing. The Examiner in this proceeding certainly gave the company every opportunity to establish discrimination if there was any, and, in the testimony herein referred to, it will be so observed.

The witnesses for the company and their attorneys either could not or did not desire to introduce evidence on this point—they seemed content to rest their case almost exclusively on the fact that they needed Revenue and that they could not continue to operate unless they were given relief. It is an attempt to get from the Interstate Commerce Commission relief which they claim they have been unable to obtain from any other source.

It seems to have been the Traction Company's whole theory that a showing of differences in rates and the need of additional revenue would be sufficient to substantiate the charge of unjust, discrimination and clothe the Commission with the power to permit (and in effect order) an advance in its intrastate rates.

The real question involved, as the city in this Brief understand the law, is not whether the company charges a different rate on one part of its line than on another, but whether, by reason of the difference in its charges, an undue and unreasonable prejudice is created against one party or locality, that is a source of undue and unreasonable advantage to another party or locality to be favored.

The question of discrimination has so many times been before the Commission that numerous decisions have been rendered by it upon that question, and for that reason a number of these decisions and excerpts therefrom have been collected and are set forth in this Brief, to which attention of this Honorable Court is respectfully called. In the same part of this Brief the

SHREVEPORT case is also set forth. That is the case which is so frequently relied upon by carriers, to justify an increase in intrastate rates. It is submitted to this Court, however, that the case at bar certainly does not come within the purview of the SHREVEPORT case. In the latter case an actual discrimination as to the rates, places and localities therein set forth was attempted to be made.

When the Transportation Act of 1920 was being considered by Congress, the words *"UNDUE BURDEN"* were stricken out by the Committee and in their place was written the words *"UNDUE, UNREASONABLE AND UNJUST DISCRIMINATION,"* also decisions are shown at that point that there is authority in construing the law to make reference to such proceedings. We claim that when Congress struck out the words *"UNDUE BURDEN"* from this Act, it reaffirmed the rule which had already been established by the Commission itself, and, by the United States Supreme Court decisions, that an *actual unlawful discrimination* against *interstate* commerce, and in favor of intrastate commerce had to be established before the Commission could take jurisdiction.

In view of the above, it is most earnestly insisted that the traction company has failed to make out a semblance of a discrimination case that would entitle them to any relief whatsoever, and, that if for no other reason, than that, it is the sincere belief of the cities that the Commission could not make any kind of an order which would change the rates, fares or charges in vogue, in the cities of Steubenville, East Liverpool

and Wellsville, under their respective franchise Ordinances.

It might be stated in this connection that the mere fact that there is a difference in rates as set forth by the traction company, in itself, does not mean anything. The evidence has clearly set forth that there are different cars, different schedules, different tracks, etc., on the local and the so-called interurban line and for that reason, there being a difference in service and accommodations, a difference in rates would not necessarily be unjustifiable. As a matter of fact, the people traveling on one car or line receive more service and accommodation than those traveling in other cars and parts of the company's line.

The able opinion of the lower Court in this case has been reported in case *The City of Wellsville vs. The United States*, 278 Fed. Rep., 769; *The City of Hubbard vs. The United States*, 278 Fed. Rep., 754, to which we respectfully refer.

GEORGE D. INGRAM,
City Solicitor,
and CHARLES BOYD,
Attorneys for City of Wellsville, Ohio.

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IN THE

Supreme Court of the United States

NO. 25 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

BRIEF OF HARRY BROKAW, AMICUS CURIAE FOR THE CITY OF EAST LIVERPOOL, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

HARRY BROKAW,
City Solicitor for the City of East Liverpool, Ohio.

SMITH BROS. CO. INC., LAW PRINTERS, 210-212 GRANT ST., PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

NO. 229 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

Statement.

An order was made by the Interstate Commerce Commission, on behalf of the Steubenville, East Liverpool and Beaver Valley Traction Company.

The order is (Tr. Page 15). This order in effect directed an increase of fares on the lines of said Company, The Steubenville, East Liverpool and Beaver

Valley Traction Company, from the Ohio Pennsylvania State line to Steubenville, Ohio. The said order placed in effect would have relieved the authorities of the State of Ohio of jurisdiction over the said lines.

Before the going into effect of said order, the City of Wellsville, the appellee herein instituted an action in the District Court in and for the Northern District of Ohio seeking a preliminary injunction, which injunction was granted and upon final hearing was made permanent. It is from this order that the appeal has been taken and the case is now in this Court.

On page 33 of the Transcript, the District Court in its finding says: "The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant than in the Village of Hubbard case. In the Company's annual report its gross receipts from these freight earnings are reported under *Express* earnings. The Company is not in our opinion subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in the Village of Hubbard case."

It will be noted here that the finding of the Interstate Commerce Commission was by a divided Court

four to five (Tr. Page 15), four of the Commissioners dissenting, and that the opinion of the District Court was the unanimous decision of the three Judges.

The opinion (Tr. 33) *City of Wellsville vs. The United States*, 278 Fed. Rep., 769 adopts and follows the opinion in the Village of *Hubbard vs. The United States*, 278 Fed. Rep., 754 and the precedents cited in the Hubbard opinion of the Court apply with equal force here.

Points.

1. The Steubenville, East Liverpool and Beaver Valley Traction Company, is not subject to the Interstate Commerce Acts and the commission is without jurisidiction to make an order.

2. The freight business is negligible and a subterfuge to get within the jurisdiction of the Commission.

3. The Franchise Contracts of the Cities of Wellsville and East Liverpool, Ohio, with the Steubenville, East Liverpool and Beaver Valley Traction Company, are valid and binding.

4. The City of Wellsville has interest to maintain the bill.

5. There is no unjust discrimination such as would warrant the action of the Commission.

General Argument.

POINT 1.

JURISDICTION OF COMMISSION.

The "Transportation Act of 1920" does not give jurisdiction to the Commission over street, suburban or interurban railway fares, rates and charges such as are involved in this proceeding and to further support this contention, attention is called to the following parts of the "Act to Regulate Commerce, as amended by the Transportation Act of 1920."

Section 15—Paragraph 3:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business."

Also, in Section 15-A (Added February 28th, 1920, of the Interstate Commerce Commission Act). In the exception set forth in which this Act shall not apply, under subdivision "B" the following language appears

> "Street or suburban electric railways, unless operated as a part of a general steam railroad system of transportation."

And under "C" of the same section, the following exceptions appear:

> "Interurban railways unless operated as a part

of a general steam railroad system of transportation, or engaged in the general transportation of freight."

Section 439. The Interstate Commerce Act is further amended by inserting therein a new section between Section 20 and Section 21, to be designated Section 20 a, and to read as follows:

"Section 20-a (1). That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act."

The language of the parts above set forth clearly indicate to what extent the Interstate Commerce Commission has jurisdiction over street railways so far as the Cities of Steubenville, East Liverpool and Wellsville are concerned.

The District Court bases its decision largely on the case of *Omaha Street Railway vs. Interstate Commerce Commission*, 230 U. S., 324.

In the *Omaha case* the Court brings out the distinction between a Street Railway and an ordinary Railway, such as within the power and jurisdiction of the Commission. That case is a distinct landmark in so far as this question is concerned. Prior to this decision the Commission had taken jurisdiction in numer-

ous Street Railway cases, but was compelled by the decision to adopt a different course.

At page 338 in the opinion the Court says:

> "The Company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains along the streets of Omaha and Council Bluffs"

The Court pointed out and distinguished the characteristics of ordinary railroads as distinguished from Street Railroads at page 336.

> "The Commerce to which Congress referred was that carried on by Railroads engaged in the hauling of passengers and freight, between States, between States and Territories and between the United States and Foreign Countries * * *. The Act referred to Railroads which were required to post their schedules, not at street corners where passengers board cars, but in every depot, and station or office where passengers are received for transportation."

We think this Omaha case absolutely determines this matter unless there has been some recent change in the law such as the transportation act which would take the matter without the pale of the Omaha case. But in examining the transportation act of 1920 we find that Congress has been very zealous and has spared no opportunity to make the matter plain by preserving many exceptions in regard to Street Railways.

Transportation Act of 1920, Sec. 422, par. (1) reads as follows:

> "The term 'carrier' means a carrier by Railroad, or partly by Railroad and partly by water within the continental United States subject to this act, *excluding* (a) sleeping car companies and express companies, (b) STREET OR SUBURBAN ELECTRIC RAILWAYS UNLESS OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION, (c) INTERURBAN ELECTRIC RAILWAYS UNLESS OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION, OR ENGAGED IN THE GENERAL TRANSPORTATION OF FREIGHT."

Transportation act of 1920, Section 402, Par. 22.

The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, OR OF STREET SUBURBAN OR INTERURBAN ELECTRIC RAILWAYS WHICH ARE NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TANSPORTATION.

Transportation act of 1920, Sec. 439, which added the new section 20-a.

That as used in the section the term 'carrier' means a common carrier by railroad, (EXCEPT A STREET, SUBURBAN OR INTERURBAN ELECTRIC RAIL-

WAY NOT OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION).

Transportation Act of 1920, Sec. 209, Par. (a).

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad system of transportation is under Federal control at the time Federal control terminates or which has heretofore engaged as a common carrier in general transportation and competed for traffic or connected with a railroad under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; BUT DOES NOT INCLUDE A STREET OR INTERURBAN ELECTRIC RAILWAY NOT UNDER THE FEDERAL CONTROL AT THE TIME FEDERA CONTROL TERMINATES, WHICH HAS AS ITS PRINCIPAL SOURCE OF OPERATING REVENUE URBAN, SUBURBAN OR INTERURBAN PASSENGER TRAFFIC OR SALE OF POWER HEAT AND LIGHT OR BOTH.

The principal source of revenue of The Steubenville East Liverpool and Beaver Valley Traction Company must be urban, suburban or interurban passenger traffic, for in their annual report under the head of express we find a freight earning of $14,864.79 for 1919 and $23,018.09 for 1920 (Transcript Page 13) while the annual report for the year 1920 shows a carriage of 10,720,707 passengers. Does this leave any doubt that

the *principal* source of operating revenue is from urban, suburban or interurban passenger traffic?

Transportation Act of 1920, Sec. 300.

Par. 1.

The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, EXCEPT A STREET, INTERURBAN OR SUBURBAN ELECTRIC RAILWAY NOT OPERATING AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION.

In view of the fact that Congress has made so many exceptions, in the transportation act of 1920, of street, suburban or interurban lines it would seem that it did not intend to include them unless they were a definite part of some stead railroad system or engaged in the general transportation of freight.

The District Court found distincely in this case that The Steubenville, East Liverpool and Beaver Valley Traction Company was neither a part of a steam railroad system of transportation nor engaged in the general transportation of freight.

A very careful distinction has been observed in the law between a street railway or an interurban railway and a railroad. And this distinction has been very clearly marked in Ohio law. In re: *Aron Beach and Southern Railway*, 16 Ohio Dec. (N. P.), 87. Judge Washburn points out the Statutory distinction and on page 94 of his opinion says: "The legislature has been careful to keep the laws in reference to each (street

railroads and steam railroads) separate and distinct; and has enacted, that whatever their Charters are, they shall be judged as to what they really are, for purposes of taxation, by the manner of their construction and operation, and the character of the business they engage in."

As to the construction of this transportation act of 1920 and other sections of the Interstate Commerce Act we wish to quote from *Illinois Central Railroad Company vs. The Public Utilities Commission,* 245 United States, 493:

> "In construing a federal statute enacted under the power conferred by the Commerce Clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done unless and except so far as its purpose to do so is clearly manifested. This being true of an Act of Congress, it is obvious that an order of a subordinate agency such as the Commission should not be given precedence over a State rate Statute otherwise valid unless it conforms to a high standard of certainty."

It seems that there has been no intention of Congress to take charge of a road like this, but upon the other hand Congress has been exceedingly careful to bring such roads within the exception. This case does not furnish a high standard of certainty.

It seems to us that the District Court reaches the gist of the matter of jurisdiction on page 43 of the transcript when it says: "Despite these differences in

phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both. In varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the commission. If they have these characteristics, obviously they would be under the jurisdiction of the commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these distinguishing characteristics."

Plainly and admittedly the defendant railway was not operated as part of a general system of steam railroad. We think this has never been seriously contended by the appellants.

THE AMOUNT OF FREIGHT BUSINESS NEGLIGIBLE AND SUBTERFUGE TO GET WITHIN THE JURISDICTON OF THE COMMISSION.

As to the amount of freight carried by the road we quote from Judge Westenhaver's opinion (Tr., page 33):

> "The amount of freight business done by it is proportionately less, and relatively more unimportant than in the Village of Hubbard Case. In the Company's annual report its gross receipts from these freight earnings are reported under *express* earnings."

In the Hubbard Case (Tr. 37) the District Court sums up the amount of revenues from freight and passenger traffic, compares them, and says that the freight is less than seven per cent (7%) of the total revenue. But in this case the percentage of freight is much lower than in the Hubbard Case.

The annual reports of the Traction Company for the years 1918, 1919 and 1920, may be found in tabulated form on page 12 of the transcript. This table contained in the findings of the commission shows the total gross income of the Company to be $840,600.62 for the year 1919 and $949,171.49 for the year 1920. Not included in this table but set out on the following page (Transcript page 13) we find that the gross freight earnings, (always taking into account that they are listed under the head of express) for the year 1919 are $14,864.79 and for 1920, $23,018.09. By a simple process of calculation we find that the freight carried by

The Steubenville East Liverpool and Beaver Valley Traction Company in 1919—is .018% one and eight tenths per cent of the total revenue and in 1920 it is .025% about two and one half per cent of the total revenues. So figured on this basis we find that the amount of freight is *very much less* and relatively more unimportant than in the Hubbard Case.

In showing the relative amount of freight and passenger traffic in the Company's report (Tr. 13) it should be noted that net passenger receipts are given and all expenses are charged against passenger receipts while nothing is charged against freight. Then too the amount of freight is charged as express and it would seem possible that at least a part of this is actually express which would still further reduce the percentage.

If a Company can carry over ten million (10,000,000) passengers and so little freight as to merit no separate listing in its annual report except under the head of express, we think the District Court is right when it says that the road is not engaged in the general business of transporting freight. See (Tr. Page 33).

It is contended by the appellant that the Interstate Commerce Commission gets jurisdiction through the handling of freight, admittedly in small quantities over the lines in question and the argument is advanced that any amount of freight however small takes it out of the limitation of the statute and that the word general has no connection with volume. But we think this contention is not sound.

It is submitted by Appellants that in determining whether or not a Company is engaged in the general transportation of freight, the criterion should be regularity of service rather than volume and it is insisted that if the carrier is generally prepared at all times that this should be the criterion.

But it must be remembered that at one place in the Transportation Act of 1920 namely Sec. 209 Paragraph (a) the term "carrier" is defined and all street or interurban electric railways are excepted whose *principal* source of revenue is urban, suburban or interurban passenger traffic. Here it seems to us is a better criterion than the one named by Appellants.

THE FRANCHISE CONTRACT OF THE CITIES OF WELLSVILLE AND EAST LIVERPOOL, OHIO ARE VALID AND BINDING.

The Statute of the State of Ohio give these Cities the power to grant franchises and to regulate fares within the respective municipalities. Acting upon the power thus conferred the Cities of Wellsville and East Liverpool did enter into agreements regulating the fares within their respective borders.

The Supreme Court of Ohio has laid down, in clear and unmistakeable terms, the rule that where a franchise ordinance has been enacted by a municipality and accepted by a Traction Company or similar utility it constitutes a binding contract. It has held that such a contract cannot be changed or interfered with even

by the Public Utilities Commission of the State. And further where two or more companies merge, as has happened in this case, and the merged Companies continue to operate, the latter is obliged to conform to the terms, rates and regulations of the franchise so given to the original Company.

Interurban Railway and Terminal Company vs. The City of Cincinnatti, 93 Ohio State, 108.

Interurban Railway and Terminal Company vs. The Public Utilities Commission of Ohio, 98 Ohio State, 287.

This same principle has been upheld and reiterated by the Supreme Court of the United States in case of *The Columbus Ry. and Power Company vs. Columbus, Ohio*, 249 U. S., 399. In the case of *Home Telephone and Telegraph Company vs. The City of Los Angeles*, 211 U. S., 265 at Page 273, it is said; "It has been settled by this Court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract the governmental power of fixing and regulating the rates, and there are many other decisions of this court touching the same point."

See also *Detroit United Railway vs. Michigan*, 242 U. S., 238 at 248.

In this case the Utilities Commission has attempted to fix rates wholly within the limits of the City of East Liverpool. At Page 15 of the transcript the following language is used in the finding of the Commission, "Nothing herein is to be construed as authorizing any change in the fares as now in effect on the Traction Company's lines for transportation of passengers who begin and end their journey within the limits of any municipality." Yet in the face of this finding tariff I C C No. 8 attempts to establish a fare from and to the following points: State line to East Liverpool Terminal 3.8 miles 10 cts., State line to East Liverpool Diamond 4.1 miles 15 cts. See Transcript Page 10.

The original petition of the Traction Company in its action before the Commission which is fully set out in the record uses the following language: "From the Ohio-Pennsylvania State line which is also the line of the City of East Liverpool through the City of East Liverpool." (Transcript Page 27). Therefore it can readily be seen that this part of the I C C No. 8 Tariff where it refers to rides wholly within the City of East Liverpool are inconsistent with the general order cited above. The two rates above mentioned are not cases of attempting to regulate rates to and between other cities but seek to regulate rates wholly within the municipality of East Liverpool, Ohio.

THE CITY OF WELLSVILLE HAS INTEREST TO MAINTAIN BILL.

The District Court in its decision in the *Village of Hubbard* case (Tr., Page 38) says:

> "The Village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation appeared and was heard. Section 13, Interstate Commerce Act permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate or fare made or imposed by authority of any State. Obviously therefore if a franchise contract made by a municipality with a carrier is the basis of the inquiry, the municipality should be made a party and be given an opportunity to be heard, and if so, it has the same right as any other party in interest to seek redress in this Court against an erroneous or unlawful order of the commission."

It seems that the City is most vitally interested and may, the same as any other party in interest, seek redress for any property right involved.

It has been the practice to allow exchanges and representative associations to be heard before the commission and to be heard in Court against its orders.

The District Court further says:

> "No good reason is perceived why the plaintiff as a party to a franchise contract injuriously

affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights."

NO UNJUST DISCRIMINATION SUCH AS WOULD WARRANT THE ACTION OF THE COMMISSION.

Not all discrimination will warrant interference of the Interstate Commerce Commission. If cases of discrimination are merely incidental or occur in a proportionately small number of cases, it will not warrant interference with local rates.

We wish to call attention to the first section of the syllabus in what is known as The Wisconsin Rate case, 257 U. S., 563, where the following language is used. "A showing that intrastate passenger fares work an undue discrimination against travelers in interstate commerce and against localities in typical instances numerous enough to justify a finding against a large class of fares is not sufficient evidence of discrimination against persons and localities, within the meaning of the transportation act of February 28th, 1920, Sec. 416, to justify a state wide order of the Intrastate Commerce Commission making a horizontal increase of all intrastate passenger fares to correspond with interstate rates, where it is clear that such an order will include many rates not within the class or the reason of the order; and a saving clause by which exceptions are permitted cannot give the order validity."

In that case in the opinion of the Chief Justice we find the following language, "The order in this case is much wider than the orders made in the proceedings following the Shreveport and Illinois Central cases. There as here the report of the commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares to all interior points, although neither may be near the border, and the fares between them may not work a discrimination against the interstate traveler at all. Nothing in the proceeding cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted cannot give the order validity."

The above Wisconsin rate cases have been much relied upon by the appellants, for other reasons than the ones cited above. We have merely cited the case and quoted extracts from the opinion as touching the question of rate discrimination. In this case the Commission, it seems, has attempted to establish rates between points wholly within the State of Ohio, and between towns where the rates have no relation whatever to interstate rates. Why should a thousand men pay an additional fare of ten cents from Wellsville, Ohio, to the East Liverpool Diamond simply because one man might beat the Company out of ten cents by re-shipping at the Diamond for points East across the State Line?

The District Court has spoken on this Wisconsin Rate Case as touching the question of jurisdiction. At page 46 of the Transcript the Court says:

> "The decision in the Wisconsin rate case rests heavily if not entirely upon new Section 15-a and new Section 20-a, both of which excluded street and interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

It seems that the Traction Company is resting its whole case on a showing of difference in rates and a need of additional revenue, and seeks to show that this is sufficient to establish discrimination of a character that is sufficient to clothe the Commission with jurisdiction and cause it to order an advance in rates. The real question is not a question of difference of rates, but whether by reason of different rates an unreasonable prejudice has been established against a party or a locality, that is a source of undue advantage to another party or locality.

We believe that the opinion of the lower Court as reported in the case of *The City of Wellsville vs. The United States*, 278 Federal, 769, should be affirmed.

HARRY BROKAW,
City Solicitor for
City of East Liverpool, Ohio.

UNITED STATES ET AL. *v.* VILLAGE OF HUBBARD, OHIO.

UNITED STATES ET AL. *v.* CITY OF WELLSVILLE, OHIO.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Nos. 25 and 26. Argued April 22, 1924; restored to docket for reargument June 9, 1924; reargued December 3, 1924.—Decided January 5, 1925.

1. The power of the Interstate Commerce Commission to require an increase of intrastate railway fares which subject interstate commerce to unjust discrimination, extends to interurban electric railroads engaged in interstate commerce although not operated as

part of a steam railway system or engaged in the general transportation of freight in addition to their passenger and express business. P. 476.

2. The fact that such fares have been fixed by contracts between the carriers and municipalities, does not deprive Congress of power to authorize such increase. P. 477, note.

278 Fed. 754; *id.* 769, reversed,

APPEALS from decrees of the District Court annulling orders of the Interstate Commerce Commission requiring increases of intrastate interurban passenger fares on electric railroads operating within and without the State of Ohio. The suits were brought by two municipalities against the United States. In each case the Commission and the carrier affected intervened.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States, at the first argument. He also filed a supplemental brief for the United States for the second argument.

Mr. T. H. Hogsett, with whom *Mr. Agnew Hice* was on the brief, for Steubenville, East Liverpool & Beaver Valley Traction Company, appellant in No. 26, at the second argument.

Mr. Edmond H. Moore, with whom *Mr. John J. Boyle* was on the brief, for the Village of Hubbard, appellee in No. 25, at both arguments.

Mr. Charles Boyd, with whom *Mr. George D. Ingram* was on the brief, for the City of Wellsville, appellee in No. 26, at both arguments.

Mr. P. J. Farrell, for the Interstate Commerce Commission, at both arguments.

Mr. Douglass D. Storey and *Mr. U. C. DeFord,* filed a brief on behalf of the Pennsylvania-Ohio Power & Light Company, appellant in No. 25.

Mr. Harry Brokaw, by leave of court, filed a brief on behalf of the City of East Liverpool, Ohio, as *amicus curiae*, in No. 26.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases were argued together. They present on substantially similar facts the question whether interurban electric railroads engaged in interstate commerce are subject generally to regulation by the Interstate Commerce Commission.

Each case is a direct appeal, under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, from a final decree of the federal court for northern Ohio setting aside an order of the Commission. In each the plaintiff below was an Ohio municipality, and the carrier, who intervened as defendant, an independent interurban electric railroad. The carriers operate lines within and between Ohio municipalities, and also between these and a city in an adjoining State. The orders require the carriers to raise intrastate interurban passenger fares which, as the Commission found, subject interstate commerce to unjust discrimination. Fares within the Ohio municipalities are not affected. *Ohio Rates, Fares, and Charges*, 64 I. C. C. 493; *Ohio and Pennsylvania Rates, Fares, and Charges*, 64 I. C. C. 517.

The Commission granted the relief under the rule of *The Shreveport Case*, 234 U. S. 342, and *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. The District Court held the orders void, on the ground that the jurisdiction conferred by Congress upon the Commission did not extend to interurban electric railroads of the character of those here involved; that its jurisdiction was limited to those which are operated as part of a general steam railroad system,

or which, if operated independently, are engaged in the general transportation of freight, in addition to their passenger and express business; and that these carriers possessed neither of "these dominating characteristics." *Village of Hubbard, Ohio,* v. *United States,* 278 Fed. 754; *City of Wellsville, Ohio,* v. *United States,* 278 Fed. 769. We have no occasion to enquire into the correctness of the latter ruling, as we are of opinion that the Commission's jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce is not so limited.[1]

In 1897, the Commission assumed jurisdiction over the passenger fares of an electric railroad which operated between the District of Columbia and a neighboring village in Maryland. *Willson* v. *Rock Creek Ry. Co.,* 7 I. C. C. 83. The development of interurban roads became general about 1902.[2] The authority to regulate them has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, interurban electric roads have been required to file with it annual reports of their finances and operations.[3] *Jurisdiction over Urban Electric Lines,* 33 I. C. C. 536. In exercising authority over their passenger fares, no distinction has been made between those interurban roads which were engaged in the general transportation of freight in addition to their

[1] It was also contended that because the intrastate fares had been fixed by contract between the municipalities and the carriers (*Interurban Railway & Terminal Co.* v. *Public Utilities Commission,* 98 Oh. St. 287), Congress was without power to authorize an increase of the fares. The unsoundness of this contention was settled in *New York* v. *United States,* 257 U. S. 591.

[2] See 77 Commercial & Financial Chronicle, July 25, 1903, p. 172. Louis E. Fischer, "Economics of Interurban Railways," p. 4.

[3] The uniform system of accounts for electric railways prescribed by the Commission became effective July 1, 1914. For the year ending December 31, 1923, reports were filed by 271 companies. They operated, in the aggregate, 14,165.28 miles of road.

passenger and express business and those which were not.[4] On the other hand the distinction suggested in *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337, between interurban railroads and urban or suburban street railways has been carefully observed.

Neither in the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, nor in any amendments thereto prior to that of June 18, 1910, c. 309, 36 Stat. 539, 552, is there any specific reference to electric railroads. The basis for the jurisdiction of the Commission over them, is the generality of the language of the original act, which declared in § 1 that its provisions "shall apply to any common carrier or carriers engaged in the transportation of passengers or property . . . by railroad." As the act made no distinction between railroads operated by steam and those operated by electricity, the

[4] *Boyle* v. *Great Falls & Dominion R. R. Co.*, 20 I. C. C. 232; *Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.*, 20 I. C. C. 406; *Citizens of Somerset* v. *Washington Ry. & El. Co.*, 22 I. C. C. 187; *Silvester* v. *City & Suburban Ry.*, 22 I. C. C. 201; *Bitzer* v. *Washington-Virginia Ry. Co.*, 24 I. C. C. 255; *Virginia Highlands Citizens' Assn.* v. *Washington-Virginia Ry. Co.*, 30 I. C. C. 593; *Damon* v. *Crosby Transportation Co.*, 33 I. C. C. 448; *Steubenville* v. *Tri-State Ry. & El. Co.*, 38 I. C. C. 281; *St. Louis, Mo.-Illinois Passenger Fares*, 41 I. C. C. 584; *Michigan Ry. Co.* v. *Michigan Central R. R. Co.*, 49 I. C. C. 255; *Louisville Passenger Fares*, 52 I. C. C. 366; *Newspapers on Passenger Cars*, 57 I. C. C. 743; *Local Fares of the Hudson & Manhattan R. R. Co.*, 58 I. C. C. 270; *Joint Passenger Fares*, 59 I. C. C. 170; *Local and Joint Passenger Fares*, 59 I. C. C. 430; *Beall* v. *Wheeling Traction Co.*, 60 I. C. C. 600; *W. B. A. Commuters Club* v. *Washington, Baltimore & Annapolis El. R. R. Co.*, 61 I. C. C. 302; *Intrastate Fares of Chicago, North Shore & Milwaukee R. R.*, 62 I. C. C. 188; *Fares of Washington-Virginia Ry. Co.*, 62 I. C. C. 200; *New Albany* v. *Louisville & Northern Ry. & L. Co.*, 64 I. C. C. 468; *Intrastate Rates Within Illinois*, 77 I. C. C. 173. Of the 267 operating companies which filed reports for the year 1917, 40 did not report any freight revenue. Of the total revenue of all the roads, only 9.4 per cent. was freight revenue.

Commission made none. Similarly, the words "common carrier by railroad" contained in the Federal Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65, *Kansas City Western Ry. Co.* v. *McAdow*, 240 U. S. 51; in the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended March 2, 1903, c. 976, 32 Stat. 943, *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497; and in the Hours of Service Act, March 4, 1907, c. 2939, 34 Stat. 1415, *Denver & Interurban Ry. Co.* v. *United States*, 236 Fed. 685, were applied to interurban electric railroads.

The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. The Commission entertained, in 1908, applications of interurban electric railroads to establish for freight through routes and joint rates with steam railroads.[5] The Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, provided that "the commission shall not . . . establish any through route, classification, or rate between street electric passenger railways not engaged in . . . transporting freight in addition to their passenger and express business and railroads of a different character."[6] Transportation Act, 1920, c. 91, 41 Stat. 456, enlarged, in several respects, the powers of the Commission, and dealt also in other ways with carriers engaged in interstate commerce. In doing so, it provided expressly in five sections for the exclusion of certain electric railways from the

[5] *Chicago & Milwaukee Electric R. R. Co.* v. *Illinois Central R. R. Co.*, 13 I. C. C. 20; *Cedar Rapids & Iowa City Ry. & L. Co.* v. *Chicago & Northwestern Ry. Co.*, 13 I. C. C. 250.

[6] See *United States* v. *American Railway Express Co.*, 265 U. S. 425, 430, note 3.

operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case.[1] These provisions indicate that Congress did not intend to deny to the Commission the power to regulate interurban railways in other respects.

Reversed.

The separate opinion of MR. JUSTICE MCREYNOLDS.

In *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, decided June 9, 1913, this Court pointed out the radical difference between street railroads and common carriers by railroad and, for the potent reasons indicated, held the latter were within

[1] Section 422, 41 Stat. 488, which introduces the new § 15a dealing with the determination of a fair return excludes "(*b*) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (*c*) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight" etc. Section 402, amending § 1, which provides for the issuance of certificates of public convenience and necessity in the case of construction, extension or abandonment of a line, excludes, by paragraph 22, p. 478, "street, suburban, [and] or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Section 439, which inserts the new § 20a, concerning the issue of securities, excludes, by par. 1, p. 494, "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Section 209, concerning the guaranty to carriers after the termination of federal control, excludes, by par. a, p. 464, "a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power," etc. Section 300, which deals with the Labor Board, excludes by par. 1, p. 469, "a street, interurban, or suburban electric railway not operating as part of a general steam railroad system of transportation."

the Interstate Commerce Act and the former were not. The distinction is certainly a sound one and, I think, it was rightly observed by the court below.

Since the opinion in 1913 Congress has given much consideration to the Interstate Commerce Act, but nowhere do I find expression of a definite purpose to disregard the limitations there approved. The question is highly important; the subject matter is essentially local in nature; the States can and should control until and unless Congress, by clear language, shall indicate its intent to regulate. The creators ought not be deprived of power over their own creatures as to domestic traffic permitted only under carefully considered contracts, because of detached and obscure sentences found here and there in a general enactment designed for carriers whose lines constitute integral parts of the great interstate railway system of the country.